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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 247.

THE METROPOLITAN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

HAMILTON A. MOORE, BY HIS NEXT FRIEND
HAMILTON O. MOORE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 5, 1884.

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1 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 13 day of October, 1883.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 13 day of Oct., 1883.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 13 day of Oct., 1883.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

1½ *Decl'n & Notice to Plead. Filed Sep. 13th*, 1881.

In the Supreme Court of the District of Columbia.

HAMILTON A. MOORE, by Next Friend, Hamilton O. Moore,
vs.
THE METROPOLITAN RAILROAD COMPANY. } Law. No. 23109.

The plaintiff sues the defendant, a body corporate, created under and by virtue of an act of Congress of the United States by the corporate name aforesaid, located and doing business in the District aforesaid, for that whereas the said defendant heretofore, to wit, on the 28th day of April, A. D. 1881, in the city of Washington and District of Columbia, the defendant owning and operating a certain

street railroad in said city and District, called the "Metropolitan Railroad Company," for the transportation of passengers, and certain servants of said defendant had the management, care, and direction of two of the cars, to wit, cars numbered 15 and 50,
and the horses attached thereto, running on the line
2 of said railroad and belonging to said defendant, and used
for transporting passengers, to wit, at the District aforesaid, yet the said defendant, not regarding and performing its duty in this behalf, took so little and so bad care of the said cars and horses that by and through the negligence, carelessness, and mismanagement of the said defendant and its said servants, and for want of due and proper care of the said defendant and its said servants, *that* one of said cars, to wit, car numbered 50, belonging to said defendant, was, with great violence, driven against, upon, and over the said plaintiff as he, the said plaintiff, was then crossing over a certain highway, to wit, Four-and-a-half street at or near the intersection of Missouri avenue northwest, at the District aforesaid, whereby the said plaintiff was struck by said car number 50 and knocked down and run over by said car number 50, and the said plaintiff became thereby and was lamed and crippled and had the bones
of both legs crushed and fractured and head and body bruised,
3 and was sick and disordered for a long space of time, to wit,
from thence —, during which time the said plaintiff suffered and underwent great pain, and the said plaintiff became permanently injured and was put to great expense, to the damage of the plaintiff in the sum of twenty thousand dollars; and therefore he brings this suit.

BENJAMIN F. BUTLER AND
FRANK T. BROWNING,
Att'ys for Pl'ff.

The defendant is to plead hereto on or before the first special term of the court; otherwise judgment.

BENJAMIN F. BUTLER AND
FRANK T. BROWNING,
Att'ys for Pl'ff.

4 *Summons. Issued Sept. 13th, 1881.*

In the Supreme Court of the District of Columbia. The 13 day of Sept., 1881.

HAMILTON A. MOORE, by Next Friend, Hamilton O. Moore, Plaintiff,
vs.
THE METROPOLITAN RAILROAD COMPANY, Def't. } At Law. No. 23109.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the firs day of its first special term, occurring 20 days after service of thi writ on you, to answer the plaintiff's suit, and show why he should

not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

[Seal Supreme Court. D. C.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

BROWNING *et al., Attorney-.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which there is no term of the court.

5 *Return of Marshal. Sep. 13th*, 1881.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant by service on John W. Tompson, president, the 13th day of Sept., 1881.

C. E. HENRY, *Marshal.*

6 *Pleas. Filed Oct. 4th*, 1881.

In the Supreme Court of the District of Columbia.

HAMILTON A. MOORE, by Next Friend, &c., }
vs. } At Law. No. 23109.
THE METROPOLITAN RAILROAD COMPANY. }

The defendant says it is not guilty, as alleged.

II. For a further plea the defendant, by its attorney, comes now and defends the force and injury when, &c., and says that the plaintiff, the said Hamilton A. Moore, ought not to have or further maintain his, the said plaintiff's, the said Hamilton A. Moore's, action against it, the defendant, because it says that the injury to the plaintiff, the said Hamilton A. Moore, set forth and complained of in the declaration was the result of the plaintiff's, the said Hamilton A. Moore's, own negligence and carelessness on the part of the plaintiff, the said Hamilton A. Moore, and in no way attributable to the fault or neglect of this defendant or its agents, and of this it puts itself upon the count-y.

NATHANIEL WILSON,
Att'y for Defendant.

7 *Joinder and Note of Issue. Filed Oct. 8th*, 1881.

In the Supreme Court of the District of Columbia.

HAMILTON A. MOORE, by Next Friend, &c., }
vs. } Law. No. 23109.
THE METROPOLITAN RAILROAD COMPANY. }

The plaintiff takes issue upon the defendant's pleas.

B. F. BUTLER AND
FRANK T BROWNING,
Att'ys for Pl'ff.

Last pleading filed October 8th, 1881.

B. F. BUTLER AND
FRANK T. BROWNING,
Atty's for Pl'ff.
NATH'L WILSON,
Att'y for Def't.

8 1882, Oct. 16.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing on the third Monday, being the sixteenth day, of October, A. D. 1882.

HAMILTON A. MOORE, by Next Friend, Hamilton O. Moore, pl'ff,
vs.
THE METROPOLITAN R. R. Co., def't. } At Law. No. 23109.

1882, Dec. 6.

Now comes here as well the plaintiff, by his attorneys, Messrs. Brown & Mattingly, as the defendant, by its attorney, Mr. Wilson, and a jury of good and lawful men of this District, to wit, Thomas L. Cropley, James L. Davis, Oscar Brown, Granville F. Hyde, Francis Hall, James R. Shanks, Edmund W. Joyce, Franklin Rives, William P. Parke, J. Blake Kendall, Collins B. Crusor, and William P. Sibley, who, being duly sworn to try the issue above joined, are respited until the meeting of the — to-morrow morning.

HAMILTON A. MOORE, by Next Friend, Hamilton O. Moore, Pl'ff,
vs.
THE METROPOLITAN R. R. Co., Def'ts. } At Law. No. 23109.

9 1882, Dec. 7.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find said issue in favor of the plaintiff, and assess his damages, by reason of the premises, at five thousand dollars besides costs. Therefore it is considered that the plaintiff recover against the said defendant five thousand dollars for his damages in manner & form as aforesaid assessed, and
8— for his costs of suit, and have execution thereof.

And now comes the defendant, by its counsel, and moves the court for a new trial on the following grounds:

1st. Because the verdict was against the weight of evidence.

2d. Because the verdict was against the instructions of the court.

10 3d. Because the damages awarded by the jury were excessive.

And also upon exceptions taken at the trial.

11 In the Supreme Court of the District of Columbia.

MOORE
vs.
THE MET. R. R. } At Law. No. —.

Now comes the defendant, by its counsel, and moves the court for a new trial on the following grounds:

1. Because the verdict was against the weight of evidence.
2. Because the verdict was against the instructions of the court.
3. Because the damages awarded by the jury were excessive.

NATH'L WILSON,
Att'y for Def't.

And also for exceptions taken at the trial.

NATH'L WILSON,
Att'y for Pl'ff.

12 DISTRICT OF COLUMBIA, *Georgetown, D. C.:*

David J. Cotter, being first duly sworn, deposes and says that he was a policeman in April, 1881, and his beat included 4½ street between Missouri avenue and Maine avenue; that in the month of March and in April, 1881, before the happening of the accident to Hamilton A. Moore and his injury by the car No. 50 of the Metropolitan R. R. Co., affiant had occasion frequently to warn a number of boys who lived in the neighborhood of 4½ street and Missouri avenue against jumping on and off the cars of the Metropolitan railroad running on 4½ street; and, further, that on several occasions shortly before said accident affiant warned the said Hamilton A. Moore against the danger of injury from his practice of jumping on said car.

Affiant further says that he is the same person who transmitted the certificate of Dr. Newman on file in this case.

DAVID J. COTTER.

Sworn to before me this 9th day of December, 1882.

M. V. BUCKLEY. [SEAL.]

13 Execution in this case is stayed until motion for new trial is heard.

Dec. 11th, 1882.

MACARTHUR, *Justice.*

14 *Motion for New Trial.*

HAMILTON A. MOORE, by Next Friend,
vs.
THE METROPOLITAN RAILROAD COMPANY. } At Law. No. 23109.

1882, JAN'Y 13TH.

The motion for a new trial coming on to be heard upon the pleadings, the testimony, and the rulings of the court as set forth in the pleadings and in the stenographic report filed herewith and marked

Exhibit "A," which said report contains all the testimony in the case and the rulings of the court, the same is hereby overruled, and from the order of the court overruling said motion the defendant hereby appeals to the court in general term.

And thereupon the defendant, by its said attorney, tenders to the court here its bills of exceptions to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made part of the record now for then, which is done accordingly.

15 *Bill of Exceptions.*

In the Supreme Court of the District of Columbia.

HAMILTON A. MOORE, by His Next Friend, Hamilton O. Moore, *vs.* THE METROPOLITAN RAILROAD COMPANY. | At Law. No. 23109.

Evidence for Plaintiff.

On the trial of this cause the plaintiff, to maintain the issues on his part joined, adduced the following testimony:

Testimony [of] Joseph Gordon.

JOSEPH GORDON, colored, sworn on behalf of the plaintiff.

Examined by Mr. BROWNING:

Q. You will tell the court and jury your name, your residence, and occupation.

16 A. I live on the corner of Four-and-a-half street and Missouri avenue; my age is—I was a little boy when President Jackson was President of the United States; I am fifty-some years of age now, sir.

Q. What is your occupation?

A. I was watchman for the Government at the time, but I am doing nothing now but tramping on the bricks. I have been on—off and on—as watchman for the Government, and that is the way I came to see the accident between the cars and this little boy.

Q. How long has it been since you were employed by the Government?

A. Ever since President Grant's time—just discharged this year.

Q. How long ago?

A. Ever since President Grant first took his seat. I was working here, sir, a few weeks ago raking leaves.

Q. You will state to this jury, in as slow and distinct a way as possible, what you saw take place down on Missouri avenue and Four-and-a-half street when you state you saw this accident—when it was and what it was.

A. I saw it. I was standing there and looking at it at the time. (Turning to the jury.) Well, gentlemen, I was standing, in the month of April——

Q. What year?

A. I cannot tell the year.

Q. How long ago?

A. About one year ago. I was looking at the little boys playing "pussy on the corner"—what I used to play when I was a boy—and car No. 50 was going to the Arsenal, and she was going at a small speed, and the conductor was speaking to somebody in the car. Car No. 15 was coming from the Arsenal. The little boy ran across the street and stubbed his foot against the track, and the horse of car No. 15 coming up knocked the little boy under car 50. I cried, "Oh, my God," and the driver put the brakes on, and the hind wheels stopped on the boy, and the conductor of 15 says, "That is what you get for not looking." If I had not halloed the little boy would have been killed. I ran and tried to get the little boy up, but was unable to get him up because I had but one arm. Some gentleman said, "Why don't you get him out?" I said, "I
17 cannot; I haven't but one arm." The little boy was in this position (illustrating), and the wheel was about to pass across his body.

Q. How was car No. 50 going?

A. On a small speed. The little boy had crossed the track of car 50.

Q. Which way was it going?

A. To the Arsenal; and car No. 15 was coming at a swift speed, as if it was making up for lost time, and knocked the little boy under car 50.

Q. Where was the little boy when you first saw him?

A. On this side. (Indicating.)

Q. The west side?

A. Yes, sir; the little boy was running, and struck his foot on the track, and the horse of car 15 hit him.

Q. What was the driver of car No. 50 doing?

A. He was talking to some one in the car, and the driver of No. 15 said: "That is what you get for not looking."

Q. How far did car No. 15 go after it struck the boy?

A. Nearly around the bend.

Q. Did the driver of car No. 15 attempt to stop the car?

A. No, sir; he did not attempt to stop the car until the little boy was under the wheel.

Q. But he did stop?

A. Car 50 had then run over the little boy.

Q. After the horse of Car No. 15, which was coming up from the Arsenal, struck the little boy, did the driver attempt to stop the car?

A. No, sir; car 50 stopped immediately after I screamed. That was what saved the boy, but car No. 15 went nearly around the bend.

Q. Did he attempt to stop as soon as the horse struck the boy?

A. I could not tell anything about that, sir. That car 50 was not very well loaded. If there had been passengers in it, as there was in 15, the little boy would have been killed.

Q. Where was car No. 50—that is, the car on the west track going toward the Arsenal; that was No. 50?

A. Yes, sir.

Q. Where was it when the little boy attempted to cross?

A. Nearly even with the house when the little boy attempted to run across it. He cleared the track of 50, but car 15 was
18 coming up at such a speed, and he struck his foot and hit the horse, and the horse threw him over, and I said: "O, Lord!" and the man immediately put the brakes on, and the driver of car 15 cried out: "That is what you get for not looking."

Mr. WILSON: Well, you needn't go all over that again.

Q. If the driver had been on the lookout——

A. (Interposing.) He might have saved the little boy. If he had been looking he might have saved the little boy.

Mr. WILSON: Well, state the facts and not give your opinion.

The WITNESS: No, sir; I am not giving my opinion; I am giving the facts. If the driver had been looking he might have saved the little boy.

Mr. WILSON: State just what you saw.

The WITNESS: I say that I saw the car when it knocked him down and when the other car ran over him.

By Mr. BROWNING:

Q. How was car No. 15 going?

A. Coming swift from the Arsenal, and car 50 was on a slow speed.

Q. Was car No. 15 going swifter than cars usually go?

A. It was going swifter than I ever saw it go. It looked as if it was making up for lost time. Car 50 was going slow, as if he was talking with somebody in the car.

Q. You say you tried to get the boy up?

A. Yes, sir; but I couldn't, because I had only one hand. I couldn't get the little boy out, and somebody came and said, "Why don't you get the little boy out?"

The COURT: Well, you needn't go over that again.

Cross-examination by Mr. WILSON:

Q. What did you say you were doing now?

A. I am doing nothing at all, sir; I have been out working for the Government, raking leaves out here.

Q. Did you make any statement about this accident at the time it happened?

A. No, sir; I did not know I would have to come here until I was summoned.

Q. You did not make any statement at the time of the accident and put it in writing?

A. No, sir.

Q. Did anybody do it for you?

A. No, sir.
19 Q. Nobody did it for you—put it down in writing?

A. No, sir.

Q. Now I would like to understand the position where you were

and where this car was (exhibiting diagram to witness). This (indicating) was car 15, which was coming up here (indicating), and 50 was going down. Here is Missouri avenue around here (indicating). Now where were you?

A. Well, here is my house, sir: in the centre of this square (indicating).

Q. There by Four-and-a-half street, and there (indicating) would be Missouri avenue?

A. Yes, sir.

Q. Now, this is the west side, and this is the east side (indicating); 50 is going down and 15 coming up (indicating). Now just tell us where you were.

Mr. MATTINGLY: It was just the other way.

Mr. WILSON: No; that is what he said.

Mr. MATTINGLY: No; 15 was going down and 15 coming up.

Mr. BROWNING: I made a mistake. It was 50 which was going down and 15 coming up.

By Mr. WILSON: 50 was going down?

A. Yes, sir.

Q. And 15 was coming up?

A. Yes, sir. Here is the corner (indicating on diagram). Here is my house right here (indicating).

Q. Well, your house isn't right in the street, between the two tracks?

A. No, sir; not in the street, but on the sidewalk. (Laughter.)

Q. Here is the railroad track (indicating)?

A. Yes, sir.

Q. There is the side of the street, and here is the curve (indicating). Where were you?

A. I was standing right above here (indicating), and car No. 50 was going along here (indicating).

Q. You were right there (indicating)?

A. Yes, sir; I was standing in the house there (indicating) when the little boy got injured.

Q. When the little boy was playing where were you?

A. I was right here (indicating). I was standing there, and the little boy was playing up here (indicating).

Q. Your house is here?

A. Yes, sir.

Q. The little boy was playing there near the curve (indicating)?

A. Yes, sir.

By the COURT: This is your house (indicating)?

A. Yes, sir; and the little boy was playing around the other corner of the house where I live.

Q. There was where you lived (indicating) and here is where the boys were playing?

A. Yes, sir; they were playing on both streets.

By Mr. WILSON:

Q. Now, when car 50 was going down, where were you?

A. Right here (indicating).

Q. And car 15 was coming up here (indicating)?

A. Yes, sir; and met the little boy and knocked him down.

Mr. WILSON: Well, answer my question.

The COURT: (To the witness.) You have said that often enough. You need not say it again.

Q. Car 15 was coming up this way (indicating) and coming fast?

A. Yes, sir.

Q. Now, where was 15 when you saw the little boy playing at the curve?

A. The little boy was somewhere about here (indicating).

Q. Then the little boy started to run across the street (referring to diagram) and car 15 was plain in sight?

A. Yes, sir.

Q. And car 50 was in plain sight going down?

A. Yes, sir.

Q. And he started to run across there (indicating) in sight of those cars?

A. Yes, sir.

Q. And he ran right in front of this car (indicating)?

A. Yes, sir.

Q. He got across that track (indicating), and was going further across when this car (indicating), coming fast, knocked him under the wheel of the other car?

A. Yes, sir; ran him back and knocked him under that wheel (indicating).

Q. Did you see him fall?

A. Yes, sir.

21 Q. You couldn't see him if you were on this side (indicating)?

A. I saw him when he was knocked back this way (illustrating). Then he fell; he fell with his back right under the car; he fell back this way (illustrating), and as he fell he tried to draw up his little legs, and the car went over his legs.

By the COURT:

Q. He fell in front of the car?

A. Yes, sir; he fell in front of the car.

By Mr. WILSON:

Q. Well, did he fall between the horse and the car?

A. Yes, sir.

Q. And the front wheel went over him?

A. Yes, sir.

Q. Was he struck by the horse or by the car?

A. By the horse.

Q. He was struck by the horse of car 15?

A. Yes, sir.

Q. And the front wheel of car 50 went over him?

A. Yes, sir; and if I hadn't holloed the little boy would have been dead.

Q. It is a pity you didn't hollo sooner. You saw that little boy start to cross the street there in front of these two cars, this car (indicating) coming very fast, and you didn't think it necessary to hollo?

A. I thought the little boy would get clear of the car.

Q. Are these boys in the habit of playing there?

A. Yes, sir.

Q. How many of them were there?

A. Oh, quite a number of them; little bits of boys.

Q. This is the park (indicating) that you live on?

A. Yes, sir; I have a little house there.

Q. What is on the other side?

A. Nothing but the square.

Q. This was on 4½ street?

A. Yes, sir.

The COURT: Missouri avenue crosses 4½ street?

Mr. WILSON: Yes, sir; running nearly east and west.

The WITNESS: I saw the car knock him down and run over him——

The COURT: (Interposing.) Now, witness, you have repeated that about a dozen times, and it is not a proper subject for you to speak about. You must not say it again.

22 By Mr. WILSON:

Q. Have you a daughter?

A. Yes, sir.

Q. Can you read or write?

A. No, sir.

Q. Do you know your daughter's handwriting when you see it?

A. No, sir; I do not know my draughter's handwriting.

Q. Did your daughter make a statement for you about this accident?

A. No, sir.

Q. She didn't make a statement, and you didn't say to her and request her to write that the driver of car No. 50 was not in fault?

A. Yes, sir; I believe I did get my daughter to write that the driver of car No. 50 was not in fault.

Q. That was the driver of the car that ran over the boy?

A. Yes, sir; I believe I did.

Q. Do you recollect saying to your daughter and telling her to write down that the little boy stubbed his toe and fell?

A. Yes, sir; I repeated that awhile ago—that the little [boy] stubbed his foot.

Q. Was it because he stubbed his foot that he fell, or because the horse knocked him down?

A. He stubbed his foot, and the horse hit him.

Q. If he had not stubbed his foot the horse would not have knocked him down?

A. No, sir; I do not think he would have struck the horse.

Q. What was your business there?

A. I was watching the park at the time. At that time I had

nothing to do; I had just come in to dinner, and was amusing myself seeing the little boys playing.

Q. How did you happen to tell your daughter and request her to say that the driver of car No. 50 was not in fault? (After a pause:) Was that true that the driver of No. 50 was not in fault?

A. Well, sir, because——

Q. (Interposing.) Well, answer my question. Is it true that the driver of car No. 50 was not in fault?

The COURT: Well, he has given us a good many opinions that are worth nothing.

23 Mr. WILSON: Yes, sir; he has repeated it a good many times, but I want to show what he said about that.

The COURT: Well, I have checked him finally about that matter.

Mr. WILSON: Well, that is all.

Redirect examination by Mr. BROWNING:

Q. You say there were a good many children playing there.

A. Yes, sir.

Q. Could anybody see the children playing there by looking out?

A. Yes, sir.

Q. How far could they have seen them?

A. They could have seen them for any distance; even the neighbors at the houses could see them.

Testimony [of] Smith Townsend.

SMITH TOWNSEND, sworn on behalf of the plaintiff:

Examined by Mr. BROWNING:

Q. What is your full name?

A. Dr. Smith Townsend.

Q. What is your occupation?

A. Physician.

Q. Health officer of the District.

A. Yes, sir.

Q. How long have you been a physician, Doctor?

A. Since 1869.

Q. Now, will you please state if you remember of being called upon in last April a year ago to treat a little boy who had been run over.

A. Yes, sir; I was called, I think it was, somewhere near the last of April or first of May, to see a little child of Mr. Moore, who, he stated, had been run over by the cars a short time before.

Q. Go on and state what took place.

A. I found upon examination——

Q. Well, would you like to have the little boy to show where the wound was?

A. Yes, sir; I could make it plainer to the jury.

24 (The plaintiff is here produced and the clothing sufficiently removed to expose the part injured.)

Now, gentlemen, I was called to this little boy about the last of April, and found upon examination a compound fracture of both limbs—a bleeding and laceration, as well as fracture of the bone. I found this in the left leg (indicating); you can see the scars here. I found the femur fractured here (indicating), a compound fracture, or, as it is called, a compact fracture, and this portion of the bone here (indicating) the laceration extended the full length (indicating) to this portion of the bone here (indicating); it had protruded out through this opening about two inches; all this part of the leg lying around here (indicating)—this portion of the leg here (indicating)—obtruded under the flesh here (indicating), making two openings; this laceration (indicating) was not so extensive, but the lower portion of the femur was obtruded out through that, this portion of the leg (indicating) lying around in that direction (illustrating); the inner muscles, the muscles on the inside near the bone, were very much lacerated, of the left leg, and were held by the large muscles on the other side (indicating); it was almost severed from the bone; the other was a compound or compact fracture, but the laceration was not so great, but still the bone was slivered, after being fractured it was slivered into three or four pieces. I got them in to position as well as I could, and I called Dr. Eliot into consultation and we fixed him in as good a condition as possible; and we saw him again in the afternoon, and, after consultation, we decided that in order to save his life—there was not much hope—but we decided that in order to save his life we would have to amputate the leg; we put him in as easy a position as possible until the next morning, and, after examination, we thought that by amputating there would be a possibility of saving his life, but his family objected to amputation, and we concluded to let it run on and see his condition.

Q. How long did you treat this little boy?

A. Well, I was treating him, Dr. Eliot and myself both together, about six months; I think about six months.

Q. Did you tell the jury about how the child was placed in the bed?

A. Well, we placed him in as easy a position as we possibly could; he was not allowed to move, of course, any more than possible. After adjusting the bone and fixing the soft parts as well as we could we attached large weights to each limb hanging over the bed (illustrating) in order to overcome the contraction of the large muscles, and kept him in that position for about three months. During this time suppuration was going on. While both bones were being healed pieces of fractured bone were continually sloughing off and needed to be attended to. We took out several pieces at different times, from time to time, as they occurred. The bones had been fractured and slivered, and they would have to be removed, of course, by an operation every time. Probably every week we would have to take out a portion of the bone to get clear of the irritation. That was continued until he got a little better and a new bone had formed, and the soft parts got better; but there were small pieces of the bone continually breaking off. I do not

think it healed up entirely for six or eight months. He got upon his feet and moved around a little during the time, of course.

Q. Do you know how long he was kept in bed in that position, with those weights?

A. I think about three months with those weights. I could have examined and found the length of time, but I think it was about that long.

Q. Do you know how long he was in bed altogether, Doctor?

A. Well, he might probably have been in bed longer than that. I think we had the weights on him for that long. We didn't feel justified in taking them off for nearly three months. It might not have been that long; I do not remember that; and then he remained in bed some time after we took the weights off. Of course he could not handle his limbs at all.

Q. Have you examined this little boy recently?

A. Yes, sir; about two or three weeks ago.

Q. What effect will this injury have upon the bodily condition of this child?

A. Well, sir, I think he will be crippled as long as he lives.

Q. Will it have any other effect upon him than making him a cripple?

26 A. By my last examination I found that both of his limbs are shorter than they were. One of them is considerably shorter than the other, and it would be impossible to get it into a straight condition; and after the bone becomes solid it makes, of course, a considerable deformity, and that deformity in movement afterwards has caused an unnatural condition of his body in his movements, which has caused a deformity of his whole body—a twisted condition of his thorax (his chest), which may, in time, have some effect upon his general condition, I think.

Q. What is the tendency?

Mr. WILSON: I object to that.

Mr. BROWNING: If your honor please, this gentleman is testifying here as an expert, and it is perfectly competent, I take it, for him to testify from his examination of this child what the tendency will be, whether it will tend to make him puny and small and diminish his robustness, &c. He is testifying as an expert in injuries of this kind.

Mr. WILSON: Let him ask what the effect will probably be, not what the tendency will be.

Mr. BROWNING: Well, it is the same thing.

Q. What will the effect probably be upon him?

A. Well, I think it will dwarf his physical condition. He will certainly never be as strong or as robust as he would be under other circumstances; I should think so.

Q. What would be the effect upon his condition, his bodily physique, and ability to perform work?

A. Well, I do not think he would be physically as strong as he would be under other circumstances; his muscles would not be as

pliable; he would not be as developed; it would prevent his physical condition from developing in a proper manner.

By Mr. MATTINGLY: Do you know how old this boy was then, Doctor?

A. I think seven or eight years old.

Cross-examination by Mr. WILSON:

Q. Doctor, were you the regular family physician of Mr. Moore?

A. Yes, sir; I had been attending the family before.

Q. Do you know how old this boy was at the time this accident happened?

A. I think he was seven or eight years old then.

Q. Then?

27 A. That was my judgment. I do not know that I ever heard his age; that I ever asked the question.

Q. You do not know?

A. No, sir.

Q. Who did you say was the other surgeon or physician?

A. Dr. Eliot.

Q. Is this little boy likely to be any lamer than he appears to be now—any more crippled than he is now?

A. Well, I do not know. As he gets older and heavier probably the deformity will exhibit itself more.

Q. Is his general health now good?

A. I think it is; I have not seen him for some time.

Redirect examination by Mr. BROWNING:

Q. Do you know the health of this little boy before the accident?

A. Yes, sir.

Q. How was it?

A. Well, I considered him a boy in excellent health; I had no occasion to be called to him.

Testimony [of] Johnson Eliot.

JOHNSON ELIOT sworn on behalf of the plaintiff.

Examined by Mr. BROWNING:

Q. Doctor, will you please give your name?

A. Johnson Eliot.

Q. Your age?

A. I have no objection to giving that, sir.

Mr. MATTINGLY: Of lawful age?

The WITNESS: Of lawful age; 66, sir, is my age.

Q. What is your occupation?

A. Physician, sir.

Q. How long have you been a physician?

A. Since 1843.

Q. You have heard Dr. Townsend's testimony. Will you please tell the jury what took place when you were called on to treat this little boy—the condition in which you found him?

A. I found him with a severe fracture of both thighs, the left, I think, worse than the right. The left was a very severe fracture; the right less so.

28 Q. Well, you can be a little more minute, if you please, Doctor, in describing the condition of the wound that he had in his left limb.

A. Well, the bone was fractured—"comminuted" is the term; that is, broken into fragments. Some were protruding through the flesh of the left limb. In the right limb there was only one protrusion, but the comminution was almost as great. His left was nearly severed from his body.

Q. Well, now, Doctor, you put the bone back in the limb. Was the wound large enough for you to get your hand into it?

A. Yes, sir; I got my thumb and fingers in very easily to extract the bone.

Q. Were there any other bruises about his body?

A. I think his hand was injured—one of his fingers; I am not certain, but there was an injury on his hand.

Q. Were there any bruises on his head?

A. I think there was a bruise on his head.

Q. How long did you treat him, Doctor?

A. The latter part of April I think I saw him—the last day of April, I think—and I visited him in July.

Q. What was done with him after placing the bones in his leg in the right position? What was done with the child then?

A. He was etherized, sir; it was impossible to manipulate without.

Q. Then what did you do with him? He was in bed at the time?

A. Subjected him to the usual surgical treatment, sir.

Q. You had a consultation with Doctor Townsend about his condition?

A. The evening of the accident.

Q. What conclusion did you come to as to his condition then?

A. That he would die.

Q. Did you conclude what would be necessary to be done in order to keep him alive?

A. Well, we did what we thought necessary at the time. We had very little hope of his recovery.

Q. Doctor, what effect has that wound upon the condition bodily—the physique and health and robustness of this child?

29 A. Well, there is a deformity and there is no telling what twelve months will develop in that limb.

Q. You say it will be a deformity, and there is no telling what may happen within twelve months. Will you please tell us what you mean by that, Doctor?

A. Well, where there is a fracture or comminuted bone we anticipate further trouble by the bone becoming detached and the wound opening.

By Mr. MATTINGLY:

Q. Suppuration ensuing again?

A. Well, when there is a foreign body there, as a loose bone, it must come out; we are always anticipating trouble of that kind.

By Mr. BROWNING:

Q. Well, has it any other effect than what you anticipate?
A. It is smaller; but generally fractured reunited bones are as strong as others.
Q. What effect as to his performing manual labor?
A. Well, I do not think he could perform at this time what a boy of his age could be expected to perform.

By Mr. MATTINGLY:

Q. Well, will you tell this jury what you think of the permanency of this injury, and what will probably be the effect of it?
A. That is what I would not like to answer. From experience we know it is a very questionable point. That boy may be yet—but I have answered that question.
Q. Well, go on and say what you were about to say.
A. That boy may lose his limb yet, sir.

By Mr. BROWNING:

Q. From this wound?
A. Yes, sir.
Q. You observe he is lame, do you?
A. Yes, sir.
Q. What was his tendency towards getting any better?
Mr. WILSON: The Doctor has answered that.
Mr. BROWNING: Well, that is all.

Cross-examination by Mr. WILSON:

Q. What you have described, Doctor, is incident to any compound fracture. There is always danger of such results as you have spoken about in cases of compound fracture?
A. Where the bone is much fractured, sir, there is always danger.
Mr. MATTINGLY: It is conceded, I suppose, that these were the cars of the defendant company?
Mr. WILSON: Oh, yes; there is no question about that.

Mrs. MOORE sworn on behalf of the plaintiff.

By Mr. BROWNING:

Q. Mrs. Moore, you are the mother of this little boy?
A. Yes, sir.
Q. How old is he?
A. He will be nine on the 18th of January.

By Mr. MATTINGLY:

Q. His name is Hamilton A. Moore?
A. Yes, sir.

By Mr. BROWNING:

Q. His father's name is Hamilton O. Moore?
A. Hamilton O. Moore.

Cross-examination by Mr. WILSON:

Q. Where did you live, Mrs. Moore?
A. The place where I live now?
Mr. WILSON: Where did you live at the time of this accident?
A. At 330 Missouri avenue.

By the COURT:

Q. How far from Four-and-a-half street is your residence?
A. About six or seven houses down—it was at the time.

The plaintiff here rests his case.

Mr. Wilson requests the court to direct a verdict for the defendant upon the evidence on behalf of the plaintiff; and after short discussion by respective counsel—

The COURT: I shall have to overrule your application, Mr. Wilson.

Mr. WILSON: I take an exception.

Mr. BROWNING: There is no doubt the cars of this F-street railroad have but one driver to drive the horse, collect the fare, and answer the questions of passengers, &c.

Mr. WILSON: Oh, yes, that is so.

Mr. BROWNING: That is admitted.

(Defendant's attorney admitted that the injury complained of occurred on defendant's road.)

31 The plaintiff then rested upon said evidence.

The defendant, by its attorney, thereupon prayed the court to instruct the jury that, upon the whole evidence offered in behalf of the plaintiff, if the jury believed the same, the plaintiff was not entitled to recover, and their verdict should be for the defendant; but the court refused said instructions, and the defendant then and there, and before the jury retired, excepted, and prays the court to sign and seal this its first bill of exceptions, which is done accordingly now for them this 13 day of January, A. D. 1883.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

32 *Second Bill of Exceptions.*

Thereupon the plaintiff, to maintain the issues on its part joined, offered in evidence testimony tending to prove that when car No. 50 turned the corner of Missouri avenue and Four-and-a-half street the said Hamilton A. Moore and five or six other boys were playing in 4½ street; that said car No. 50 and car No. 15 were both proceeding at a moderate rate of speed; at the time said cars met on 4½ street the said boy was riding on the back steps of car No. 15 or suddenly jumped upon and off the hind step of car 15 just as car 50 was passing and came or fell suddenly from behind said car No. 15

and fell between the swingle-tree and the front wheels of car No. 50, and that the front wheels of said car No. 50 passed over him before the driver could stop said car, although he attempted to stop said car as soon as he saw said boy, and that at the time said boy came or fell from behind said car 15 the driver of said car No. 50 was not looking into said car or talking to any person therein; that said cars were one-horse cars—had no conductor; the driver had to drive the horse, look out for passengers, stop the car on ringing of the bell, collect fares, make change, and answer inquiries of passengers.

33 The defendant thereupon rested.

And thereupon the plaintiff in rebuttal offered in evidence the testimony of the said Hamilton O. Moore, who testified that he was the father of the said Hamilton A. Moore; and upon cross-examination the said Hamilton O. Moore was asked to state whether the fee of the attorneys for the plaintiff was contingent, and, if the amount claimed in the declaration were received, what proportion thereof would be for the benefit of the said boy, and what proportion would be for the benefit of the attorneys, but the attorneys for the plaintiff objected to said question, and the court sustained their objection; and to the ruling of the court in sustaining said objection, and in refusing to permit said question to be put, the defendant, by its attorney, then and there, and before the jury retired, excepted, and prays the court to sign and seal this its second bill of exceptions, which is done accordingly now for then this 13th day of January, A. D. 1883.

ARTHUR MacARTHUR, *Justice.* [SEAL.]

34 *Third Bill of Exceptions.*

And the plaintiff in further rebuttal of the testimony of the defendant adduced as a witness one Maury, who testified that he saw the accident by which the said boy was injured, and he was thereupon asked by the attorney for the plaintiff the following question: "It has been testified here, Mr. Maury, that this little boy in running across the street jumped upon the rear step of the car coming up, and immediately jumped off again and was struck by the horse of the other car. Just state to the jury whether or not, in point of fact, he did jump upon the step of the car and immediately off again; whether he was on the step or not?"

And thereupon the attorney for the defendant objected to said question, but the court allowed the same to be asked, and the said witness replied, "No, sir; he did not."

And thereupon the defendant, by its attorney, objected to said answer, and to the ruling of the court allowing said question to be asked and said answer to be received in evidence the defendant duly excepted and prays the court to sign and seal this its third bill of exceptions, which is done accordingly now for then this 13th day of January, A. D. 1883.

ARTHUR MacARTHUR, *Justice.* [SEAL.]

35 *Plaintiff's Prayers.*

The plaintiff thereupon prayed the court to instruct the jury as follows:

Mr. MATTINGLY: I desire to offer the following prayers: (Reading.)

1. The law requires of the defendant the exercise of reasonable care and caution in running its cars over and across the streets in this city, in order to avoid injury to persons upon the streets; and if the defendant, or its agents or servants, by the exer-
36 cise of reasonable care, could have prevented the injury to the plaintiff, then the plaintiff is entitled to recover unless you should further find that the plaintiff was himself guilty of negligence contributing to his injury.

But in considering the question of the plaintiff's negligence he is only to be held responsible for the exercise of such judgment, prudence and discretion as is natural to and to be expected from a boy of his age.

The next is as to the burden of proof: (Reading.)

2. If the jury find from the evidence that the defendant, its agents or servants, by the exercise of reasonable and proper care could have prevented the injury to the plaintiff, then, in order to avoid liability, the burden of proof is upon the railroad company to prove that the plaintiff was guilty of failing to use such degree of ordinary care and prudence as would naturally be expected from a boy of his age, which contributed to his injury.

And the third is simply on the question of damages: (Reading.)

3. If the jury find that the plaintiff is entitled to recover, then he is entitled to such damages as will compensate him for the pain and suffering he has endured and the injury he has received, regard being had to their permanency.

Mr. BROWNING: Your honor, I have prepared a prayer on the question of damages which is a litte more minute than the one just offered by Mr. Mattingly (reading):

If the jury find for the plaintiff in estimating the damages they are to consider the health and condition of the plaintiff before the jury complained of as compared with his present condition in consequence of said injury, and whether the said injury is in its nature permanent, and how far it is calculated to disable the plaintiff from engaging in those industrial pursuits and employments for which, in the absence of such jury, he would be qualified; and also the physical and mental suffering to which he was subjected by reason of said injury, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which the plaintiff has sustained.

Mr. MATTINGLY (to Mr. Browning): You might substitute that for the third one of mine.

Mr. BROWNING: Yes; I will substitute this prayer for the third prayer offered by Mr. Mattingly.

37 And the court thereupon granted said prayers, and each of them; and to the granting of the said prayers, and each of them, the defendant then and there, and before the jury retired, excepted, and prays the court to sign and seal this its fourth bill of exceptions, which is done accordingly, now for then, this 13th day of January, A. D. 1883.

ARTHUR MacARTHUR, *Justice.* [SEAL.]

38 The defendant thereupon prayed the court to instruct the jury as follows:

Mr. Wilson offers the following prayers (reading):

1. If the jury find from the whole evidence that the cars of the defendant, Nos. 15 and 50, were moving at their usual rate of speed along Four-and-a-half street, car No. 15 going north and car No. 50 going south, and that the plaintiff attempted to cross the railroad track when the cars were about meeting, and went in front of either of said cars so suddenly that it was not possible for the drivers of said cars to prevent the plaintiff from being run over, the plaintiff is not entitled to recover.

2. If the jury find from the evidence that the plaintiff did not exercise reasonable prudence in crossing the track of the *plaintiff* in full view of two approaching cars the plaintiff is not entitled to recover.

3. If the jury find from the whole evidence that the plaintiff, the boy H. A. Moore, was riding on the back step of car No. 15, and stepped off and towards car No. 50 as it was passing, and threw himself against the horse that was drawing car No. 15, or in front of said car, and was knocked down and run over and injured before the driver could stop the car or prevent the accident, the plaintiff is not entitled to recover.

4. If the jury find from the testimony that at the time of the accident described in the declaration, the plaintiff was a child seven years of age, and was allowed by his father, who sues as the next friend of said child, to play in the street in which the defendant's tracks are situated, and that said child ran in the way of car No. 50 in a manner which amounted to negligence, and in consequence thereof received the injury complained of, and that the driver, as soon as he perceived said child, endeavored to stop said car, but was unable to do so in time, and was not negligent in the management of said car, the plaintiff is not entitled to recover.

Mr. WILSON: That is all I have; the only other one relates to damages—that it is not a case of vindictive damages.

Mr. MATTINGLY: Oh, we concede that.

The COURT: Well, I believe all the instructions are proper, except the last one.

Mr. WILSON: The last one is putting in another form the diligence or care that should be exercised by the child.

The COURT: Well, I shall instruct the jury on that subject instead of giving that prayer.

Mr. WILSON: I except to your honor's refusal to grant my last prayer, and also to the granting of the plaintiff's prayers.

Mr. BROWNING: We except to the granting of the prayers of the defendant.

39 And the court granted the first, second, and third of said prayers, but refused the fourth, stating he would charge the jury as to it; to which refusal the defendant, by its attorney, then and there, and before the jury retired, excepted, and prays the court to sign and seal this its fifth bill of exceptions, which is done accordingly, now for then, this 13th day of January, A. D. 1883.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

The court then instructed the jury as follows:

Charge of the Court.

The COURT: The party injured in this case was a child seven years of age, and that is a circumstance which naturally affects the case, because the same degree of judgment, prudence, and caution is not to be expected from so young a person as would be required from an older and maturer person. With regard to grown-up persons they must be free from negligence in order to recover; that is called "contributory negligence." It is somewhat different in regard to a child. The law adapts itself to the condition and age of the party injured. In this case, if the child was exercising that degree of care that would be expected from one of that age, and was injured by the negligence of the defendant, he is entitled to recover.

The liability here depends upon the circumstances of the case. I have been asked to instruct you as to the burden of proof. The burden of proof is rather an abstract proposition; but, so far as the defendant is concerned, the law imposes upon the company with regard to a child the necessity of exonerating their conduct from negligence, and of showing that the child was guilty of that degree of negligence which will relieve them from responsibility. Now, I have no doubt that if this accident occurred from the negligence of the defendant or its agent—and when I speak of the defendant I speak of anything that is done by its agents or suffered by its agents to be done—

40 if the injury occurred through want of proper care and caution, the plaintiff would be entitled to recover, unless the defendant in addition shows that from the circumstances of the case the accident was inevitable, or that the child was not exercising that degree of care for which he was responsible as a child. If the accident was inevitable the child must bear the burden of it: that is, if the proper care and prudence of the plaintiff could have prevented its occurrence, then the plaintiff would be responsible. So that, so far as the burden of proof is concerned, you will consider all the circumstances of the case, and if, upon the whole testimony, it appears to you satisfactorily that within the rules I have just laid down

the defendant, or the company, has successfully sustained their part of the issue, they are entitled to your verdict.

There are one or two particular features in the case to which my attention is called, and your attention is called by the instructions. I have stated, I think, fully the grounds upon which I think the plaintiff is entitled to recover, and the principles of law which he has claimed should be given to the jury in his written instructions. The defendant, however, requests me to state to you as matter of law that if this child ran upon the track in such a sudden manner that by the exercise of proper caution and care there was not time to stop the cars or the horses the company is not responsible. That is undoubtedly true, and I do not understand that principle to be controverted on the other side.

The other point to which particular attention is directed is, if the boy was running after the car which was going north, and was in the act of stepping upon the rear platform, when he instantly abandoned it and got out upon the track before there was time to stop the car which was going in the opposite direction, that would be a complete defense here. And I think it would. Now, while a child is to be held responsible only for such care and caution as is suitable to its age, an act of that kind is a mischievous one; and while children are exempt from the responsibility of a grown-up person they are still responsible for mischievous conduct; and if a child does an act of that kind, and in doing so, without the fault of the other side, receives an injury, it is an injury which the child incurs under circumstances which render the other party harmless so far as an action at law is concerned.

11 Now, something has been said about these children playing on the street. Well, we know that children do play upon the street, and it goes to illustrate the kind of capacity and judgment a child has; and when we see children playing upon the street, therefore, where there is no danger to [be] apprehended, it looks just like an act that a child would do; it looks just like conduct that is common to most of children. When a railroad is running through one of the public thoroughfares of the city it is the duty of parents to look after their children, and for their own sake to keep them as much as possible away from a playground upon the railroad, and the parent who neglects this duty incurs sometimes a fearful responsibility, and exposes his own child to very great risks. Still, a railroad that runs through the public streets of the city has not got the exclusive right to their occupancy and use. They have got only the use of the street for the purposes of their road, and all the other citizens, including men, women, and children, have a perfect right to use the street. They are required, however, to exercise such care and caution as will protect themselves from the use of the street by a machinery of this description, and they are not to run under the horses' feet or under the cars. They are called upon to exercise their sight and hearing and their powers of locomotion, and if they neglect in this respect they take the risk upon themselves. But you will bear in mind the qualification which I have just stated in this connection in regard to children. Therefore,

while children are upon the street they are in the exercise, to some extent, of a legal right, and I would be very loath to lay down the proposition that children may not use the street for playing occasionally. As was stated by one of the counsel, it is very much the only place they have in close cities, although in this city such are the admirable arrangements—there are large circles and squares almost everywhere—that children can enjoy some freedom; and when they are permitted to roam upon the street they usually romp and become boisterous, and acquire habits which, perhaps, children would be better without; but, after considering all these things as matters of social propriety, there is left the broad doctrine that all persons may occupy these streets, subject, of course, to the exercise of caution, and subject to the other use to which the street is appropriated; and if they do that they are within the protection
42 of the law. If, however, they do not exercise that degree of care which is imposed upon children in the case of an injury—or upon adult persons in the case of an injury—and come to grief, they must bear the consequences.

Now, I think that I will give you just what I have been saying to you on this topic in the place of the last instruction which has been asked for on the part of the defendant, and I think this disposes of all that is necessary for the court to say.

Mr. MATTINGLY: Before your honor leaves that point I will ask your honor to state the correlative duty of the railroad company using the street that they have to adapt their use to the habits of children.

The COURT: Well, I suppose that was implied. The streets have to be used by citizens, subject to the purposes for which they are occupied by the railroad company, and the railroad company must use it subject to the right of the citizens.

And this brings us to the question of damages—a question that is left, generally, to the jury, subject to some slight instructions from the court. In this case no vindictive damages are claimed, but simply the actual damage which has been sustained. There is no doubt that this child has suffered a very severe injury, perhaps one that will effect his condition indefinitely, and, perhaps, through life. That he must have suffered considerably is quite evident from the nature of the injury. You will consider the case and give him such damages as are proper in view of the circumstances and the injury. You will bear in mind that this is only a horse railway; that it is not one of those gigantic corporations that wheel ponderous mechanism through our streets, but it is run by power that is quite controllable—by horse power—and that it is so very controllable is evident from the fact, which does not appear to be disputed in this case, that the car was stopped before it had time to pass the length between the two wheels—almost instantly. And, upon the whole, you are not expected to give damages against this company by way of making an example of them, but you are just to compensate the plaintiff in a reasonable amount. On that subject I simply ask you, gentlemen, to be reasonable in regard to your verdict, because it is only reasonable verdicts, after all, that are satisfactory; and some-

times when they are excessive they not only create dissatisfaction, but embarrassment in the subsequent proceedings in the case.

Mr. WILSON: Your honor omitted unintentionally a qualification; whether or not they are to award any damages depends upon whether or not the find the defendant was guilty of negligence.

The COURT: Oh, yes; I imagined that you find in favor of the plaintiff. If you find that the railroad company were not at fault you will return a verdict for the defendant.

43 To which said instruction and every part thereof the defendant, by its attorney, then and there and before the jury retired excepted, and prays the court to sign and seal this its sixth bill of exceptions, which is done accordingly, now for then, this 13th day of January, A. D. 1883.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

The jury thereupon retired to their room, and subsequently returned a verdict in favor of the plaintiff in the sum of five thousand dollars.

44 In the Supreme Court of the District of Columbia.

MOORE
v. } At Law. No. —.
THE MET. R. R.

Now comes the defendant, by its counsel, and moves the court for a new trial on the following grounds:

1. Because the verdict was against the weight of evidence.
2. Because the verdict was against the instructions of the court.
3. Because the damages awarded by the jury were excessive.

NATHANIEL WILSON,
Att'y for Def't.

And also for exceptions taken at the trial.

NATHANIEL WILSON,
Att'y for Pl'ff.

In the Supreme Court of the District of Columbia.

MOORE *v.* METROPOLITAN R. R.

The motion for a new trial coming on to be heard upon the pleadings, the testimony, and the rulings of the court, as set forth in said pleadings and in the stenographic report filed herewith and marked Exhibit A, which said report contains all the testimony in the case and the rulings of the court, the same is hereby overruled: and from the order of the court overruling said motion the defendant hereby appeals to the court in general term.

By the court: MACARTHUR, *Justice.*

Mr. WILSON: State just what you saw.

The WITNESS: I say that I saw the car when it knocked him down and when the other car ran over him.

By Mr. BROWNING:

Q. How was car No. 15 going?

A. Coming swift from the Arsenal, and car 50 was on a slow speed.

Q. Was car No. 15 going swifter than cars usually go?

A. It was going swifter than I ever saw it go; it looked as if it was making up for lost time. Car 50 was going slow, as if he was talking with somebody in the car.

Q. You say you tried to get the boy up?

A. Yes, sir; but I couldn't, because I had only one hand. I couldn't get the little boy out, and somebody came and said, "Why don't you get the little boy out?"

The COURT: Well, you needn't go over that again.

Cross-examination by Mr. WILSON:

Q. What did you say you were doing now?

A. I am doing nothing at all, sir. I have been out working for the Government, raking leaves out here.

Q. Did you make any statement about this accident at the time it happened?

A. No, sir; I did not know I would have to come here until I was summoned.

Q. You did not make any statement at the time of the accident and put it in writing?

A. No, sir.

Q. Did anybody do it for you?

A. No, sir.

49 Q. Nobody did it for you—put it down in writing?

A. No, sir.

Q. Now, I would like to understand the position where you were, and where this car was (exhibiting diagram to witness). This (indicating) was car 15, which was coming up here (indicating), and 50 was going down. Here is Missouri avenue around here (indicating). Now where were you?

A. Well, here is my house, sir; in the centre of this square (indicating).

Q. There by Four-and-a-half street, and there (indicating) would be Missouri avenue?

A. Yes, sir.

Q. Now, this is the west side, and this is the east side (indicating); 50 is going down and 15 coming up (indicating). Now just tell us where you were.

Mr. MATTINGLY: It was just the other way.

Mr. WILSON: No; that is what he said.

Mr. MATTINGLY: No; 15 was going down and 15 coming up.

Mr. BROWNING: I made a mistake; it was 50 which was going down and 15 coming up.

By Mr. WILSON: 50 was going down?

A. Yes, sir.

Q. And 15 was coming up?

A. Yes, sir; here is the corner (indicating on diagram); here is my house right here (indicating).

Q. Well, your house isn't right in the street, between the two tracks?

A. No, sir; not in the street, but on the sidewalk. (Laughter.)

Q. Here is the railroad track (indicating)?

A. Yes, sir.

Q. There is the side of the street, and here is the curve (indicating). Where were you?

A. I was standing right above here (indicating), and car No. 50 was going along here (indicating).

Q. You were right there (indicating)?

A. Yes, sir; I was standing in the house there (indicating) when the little boy got injured.

Q. When the little boy was playing where were you?

A. I was right here (indicating); I was standing there, and the little boy was playing up here (indicating).

50 Q. Your house is here?

A. Yes, sir.

Q. The little boy was playing there, near the curve (indicating).

A. Yes, sir.

By the COURT: This is your house (indicating)?

A. Yes, sir; and the little boy was playing around the other corner of the house where I live.

Q. There was where you lived (indicating) and here is where the boys were playing?

A. Yes, sir; they were playing on both streets.

By Mr. WILSON:

Q. Now, when car 50 was going down, where were you?

A. Right here (indicating).

Q. And car 15 was coming up here (indicating)?

A. Yes, sir; and met the little boy and knocked him down.

Mr. WILSON: Well, answer my question.

The COURT (to the witness): You have said that often enough; you need not say it again.

Q. Car 15 was coming up this way (indicating) and coming fast?

A. Yes, sir.

Q. Now, where was 15 when you saw the little boy playing at the curve?

A. The little boy was somewhere about here (indicating).

Q. Then the little boy started to run across the street (referring to diagram) and car 15 was plain in sight?

A. Yes, sir.

Q. And car 50 was in plain sight going down?

A. Yes, sir.

Q. And he started to run across there (indicating) in sight of those cars?

A. Yes, sir.

Q. And he ran right in front of this car (indicating)?

A. Yes, sir.

Q. He got across that track (indicating) and was going further across, when this car (indicating) coming fast knocked him under the wheel of the other car?

A. Yes, sir; ran him back and knocked him under that wheel (indicating).

Q. Did you see him fall?

A. Yes, sir.

51 Q. You couldn't see him if you were on this side (indicating)?

A. I saw him when he was knocked back this way (illustrating). Then he fell; he fell with his back right under the car; he fell back this way (illustrating), and as he fell he tried to draw up his little legs, and the car went over his legs.

By the COURT:

Q. He fell in front of the car?

A. Yes, sir; he fell in front of the car.

By Mr. WILSON:

Q. Well, did he fall between the horse and the car?

A. Yes, sir.

Q. And the front wheel went over him?

A. Yes, sir.

Q. Was he struck by the horse or by the car?

A. By the horse.

Q. He was struck by the horse of car 15?

A. Yes, sir.

Q. And the front wheel of car 50 went over him?

A. Yes, sir; and if I hadn't holloed the little boy would have been dead.

Q. It is a pity you didn't hollo sooner. You saw that little boy start to cross the street there in front of these two cars, this car (indicating) coming very fast, and you didn't think it necessary to hollo?

A. I thought the little boy would get clear of the car.

Q. Are these boys in the habit of playing there?

A. Yes, sir.

Q. How many of them were there?

A. Oh, quite a number of them—little bits of boys.

Q. This is the park (indicating) that you live on?

A. Yes, sir; I have a little house there.

Q. What is on the other side?

A. Nothing but the square.

Q. This was on 4½ street?

A. Yes, sir.

The COURT: Missouri avenue crosses 4½ street?

Mr. WILSON: Yes, sir; running nearly east and west.

The WITNESS: I saw the car knock him down and run over him——

The COURT (interposing): Now, witness, you have repeated that about a dozen times, and it is not a proper subject for you to speak about. You must not say it again.

52 By Mr. WILSON:

Q. Have you a daughter?

A. Yes, sir.

Q. Can you read or write?

A. No, sir.

Q. Do you know your daughter's handwriting when you see it?

A. No, sir; I do not know my daughter's handwriting.

Q. Did your daughter make a statement for you about this accident?

A. No, sir.

Q. She didn't make a statement, and you didn't say to her and request her to write that the driver of car No. 50 was not in fault?

A. Yes, sir; I believe I did get my daughter to write that the driver of car No. 50 was not in fault.

Q. That was the driver of the car that ran over the boy?

A. Yes, sir; I believe I did.

Q. Do you recollect saying to your daughter and telling her to write down that the little boy stubbed his toe and fell?

A. Yes, sir; I repeated that awhile ago; that the little [boy] stubbed his foot.

Q. Was it because he stubbed his foot that he fell or because the horse knocked him down?

A. He stubbed his foot and the horse hit him.

Q. If he had not stubbed his foot the horse would not have knocked him down?

A. No, sir; I do not think he would have struck the horse.

Q. What was your business there?

A. I was watching the park at the time. At that time I had nothing to do. I had just come in to dinner, and was amusing myself seeing the little boys playing.

Q. How did you happen to tell your daughter and request her to say that the driver of car No. 50 was not in fault? (After a pause.) Was that true that the driver of No. 50 was not in fault?

A. Well, sir, because——

Q. (Interposing.) Well, answer my question. Is it true that the driver of car No. 50 was not in fault?

The COURT: Well, he has given us a good many opinions that are worth nothing.

53 Mr. WILSON: Yes, sir; he has repeated it a good many times, but I want to show what he said about that.

The COURT: Well, I have checked him finally about that matter.

Mr. WILSON: Well, that is all.

Redirect examination by Mr. BROWNING:

Q. You say there were a good many children playing there?
A. Yes, sir.
Q. Could anybody see the children playing there by looking out?
A. Yes, sir.
Q. How far could they have seen them?
A. They could have seen them for any distance; even the neighbors at the houses could see them.

SMITH TOWNSEND sworn on behalf of the plaintiff.

Examined by Mr. BROWNING:

Q. What is your full name?
A. Dr. Smith Townsend.
Q. What is your occupation?
A. Physician.
Q. Health officer of the District?
A. Yes, sir.
Q. How long have you been a physician, Doctor?
A. Since 1869.
Q. Now, will you please state if you remember of being called upon in last April a year ago to treat a little boy who had been run over?
A. Yes, sir; I was called, I think it was, somewhere near the last of April or first of May to see a little child of Mr. Moore who, he stated, had been run over by the cars a short time before.
Q. Go on and state what took place.
A. I found upon examination——
Q. Well, would you like to have the little boy to show where the wound was?
A. Yes, sir; I could make it plainer to the jury.

54 (The plaintiff is here produced and the clothing sufficiently removed to expose the part injured.)

Now, gentlemen, I was called to this little boy about the last of April and found upon examination a compound fracture of both limbs—a bleeding and laceration, as well as fracture of the bone. I found this in the left leg (indicating); you can see the scars here. I found the femur fractured here (indicating), a compound fracture, or, as it is called, a compact fracture, and this portion of the bone here (indicating) the laceration extended the full length (indicating) to this portion of the bone here (indicating). It had protruded out through this opening about two inches. All this part of the leg lying around here (indicating), this portion of the leg here (indicating), obtruded under the flesh here (indicating), making two openings. This laceration (indicating) was not so extensive, but the lower portion of the femur was obtruded out through that, this portion of the leg (indicating) lying around in that direction (illustrating). The inner muscles, the muscles on the inside near the bone,

were very much lacerated, of the left leg, and were held by the large muscles on the other side (indicating); it was almost severed from the bone. The other was a compound or compact fracture, but the laceration was not so great, but still the bone was slivered; after being fractured it was slivered into three or four pieces. I got them into position as well as I could, and I called Dr. Eliot into consultation, and we fixed him in as good a condition as possible; and we saw him again in the afternoon, and after consultation we decided that in order to save his life—there was not much hope—but we decided that in order to save his life we would have to amputate the leg. We put him in as easy a position as possible until the next morning, and, after examination, we thought that by amputating there would be a possibility of saving his life; but his family objected to amputation, and we concluded to let it run on and see his condition.

Q. How long did you treat this little boy?

A. Well, I was treating him, Dr. Eliot and myself both together, about six months, I think—about six months.

Q. Did you tell the jury about how the child was placed in the bed?

55 A. Well, we placed him in as easy a position as we possibly could; he was not allowed to move, of course, any more than possible. After adjusting the bone, and fixing the soft parts as well as we could we attached large weights to each limb hanging over the bed (illustrating), in order to overcome the contraction of the large muscles, and kept him in that position for about three months. During this time suppuration was going on. While both bones were being healed pieces of fractured bone were continually sloughing off, and needed to be attended to. We took out several pieces at different times from time to time as they occurred. The bones had been fractured and slivered, and they would have to be removed, of course, by an operation every time. Probably every week we would have to take out a portion of the bone to get clear of the irritation. That was continued until he got a little better and a new bone had formed and the soft parts got better; but there were small pieces of the bone continually breaking off. I do not think it healed up entirely for six or eight months. He got upon his feet and moved around a little during the time, of course.

Q. Do you know how long he was kept in bed in that position with those weights?

A. I think about three months with those weights. I could have examined and found the length of time; but I think it was about that long.

Q. Do you know how long he was in bed altogether, Doctor?

A. Well, he might probably have been in bed longer than that. I think we had the weights on him for that long. We didn't feel justified in taking them off for nearly three months. It might not have been that long; I do not remember that; and then he remained in bed some time after we took the weights off. Of course he could not handle his limbs at all.

Q. Have you examined this little boy recently?

A. Yes, sir; about two or three weeks ago.

Q. What effect will this injury have upon the bodily condition of this child?

A. Well, sir, I think he will be crippled as long as he lives.

Q. Will it have any other effect upon him than making him a cripple?

56 A. By my last examination I found that both of his limbs are shorter than they were. One of them is considerably shorter than the other, and it would be impossible to get it into a straight condition; and after the bone becomes solid it makes, of course, a considerable deformity, and that deformity in movement afterwards has caused an unnatural condition of his body in his movements which has caused a deformity of his whole body—a twisted condition of his thorax (his chest) which may in time have some effect upon his general condition, I think.

Q. What is the tendency.

Mr. WILSON: I object to that.

Mr. BROWNING: If your honor please, this gentleman is testifying here as an expert, and it is perfectly competent, I take it, for him to testify from his examination of this child what the tendency will be—whether it will tend to make him puny and small and diminish his robustness, &c. He is testifying as an expert in injuries of this kind.

Mr. WILSON: Let him ask what the effect will probably be, not what the tendency will be.

Mr. BROWNING: Well, it is the same thing.

Q. What will the effect probably be upon him?

A. Well, I think it will dwarf his physical condition. He will certainly never be as strong or as robust as he would be under other circumstances; I should think so.

Q. What would be the effect upon his condition, his bodily physique, and ability to perform work?

A. Well, I do not think he would be physically as strong as he would be under other circumstances; his muscles would not be as pliable; he would not be as developed; it would prevent his physical condition from developing in a proper manner.

By Mr. MATTINGLY:

Q. Do you know how old this boy was then, Doctor?

A. I think seven or eight years old.

Cross-examination by Mr. WILSON:

Q. Doctor, were you the regular family physician of Mr. Moore?

A. Yes, sir; I had been attending the family before.

Q. Do you know how old this boy was at the time this accident happened?

A. I think he was seven or eight years old then.

Q. Then?

57 A. That was my judgment. I do not know that I ever heard his age—that I ever asked the question.

Q. You do not know?

A. No, sir.

Q. Who did you say was the other surgeon or physician?

A. Dr. Eliot.

Q. Is this little boy likely to be any lamer than he appears to be now—any more crippled than he is now?

A. Well, I do not know. As he gets older and heavier probably the deformity will exhibit itself more.

Q. Is his general health now good?

A. I think it is. I have not seen him for some time.

Redirect examination by Mr. BROWNING:

Q. Do you know the health of this boy before the accident?

A. Yes, sir.

Q. How was it?

A. Well, I considered him a boy in excellent health; I had no occasion to be called to him.

JOHNSON ELIOT sworn on behalf of the plaintiff.

Examined by Mr. BROWNING:

Q. Doctor, will you please give your name?

A. Johnson Eliot.

Q. Your age?

A. I have no objection to giving that, sir.

Mr. MATTINGLY: Of lawful age?

The WITNESS: Of lawful age; 66, sir, is my age.

Q. What is your occupation?

A. Physician, sir.

Q. How long have you been a physician?

A. Since 1843.

Q. You have heard Dr. Townsend's testimony. Will you please tell the jury what took place when you were called on to treat this little boy—the condition in which you found him?

A. I found him with a severe fracture of both thighs, the left, I think, worse than the right. The left was a very severe fracture; the right less so.

58 Q. Well, you can be a little more minute, if you please, Doctor, in describing the condition of the wound that he had in his left limb.

A. Well, the bone was fractured—"comminuted" is the term—that is, broken into fragments. Some were protruding through the flesh of the left limb; in the right limb there was only one protrusion, but the comminution was almost as great; his left was nearly severed from his body.

Q. Well now, Doctor, you put the bone back in the limb. Was the wound large enough for you to get your hand into it?

A. Yes, sir; I got my thumb and fingers in very easily to extract the bone.

Q. Were there any other bruises about his body?

A. I think his hand was injured—one of his fingers; I am not certain, but there was an injury on his hand.

Q. Were there any bruises on his head?

A. I think there was a bruise on his head.

Q. How long did you treat him, Doctor?

A. The latter part of April I think I saw him—the last day of April, I think—and I visited him in July.

Q. What was done with him after placing the bones in his leg in the right position; what was done with the child then?

A. He was etherized, sir; it was impossible to manipulate without.

Q. Then what did you do with him; he was in bed at the time?

A. Subjected him to the usual surgical treatment, sir.

Q. You had a consultation with Doctor Townsend about his condition?

A. The evening of the accident.

Q. What conclusion did you come to as to his condition then?

A. That he would die.

Q. Did you conclude what would be necessary to be done in order to keep him alive?

A. Well, we did what we thought necessary at the time; we had very little hope of his recovery.

Q. Doctor, what effect has that wound upon the condition bodily—the physique and health and robustness of this child?

59 A. Well, there is a deformity, and there is no telling what twelve months will develop in that limb.

Q. You say it will be a deformity, and there is no telling what may happen within twelve months. Will you please tell us what you mean by that, Doctor?

A. Well, where there is a fracture or a comminuted bone we anticipate further trouble by the bone becoming detached and the wound opening.

By Mr. MATTINGLY:

Q. Suppuration ensuing again.

A. Well, when there is a foreign body there, as a loose bone, it must come out. We are always anticipating trouble of that kind.

By Mr. BROWNING:

Q. Well, has it any other effect than what you anticipate?

A. It is smaller, but generally fractured reunited bones are as strong as others.

Q. What effect as to his performing manual labor?

A. Well, I do not think he could perform at this time what a boy of his age could be expected to perform.

By Mr. MATTINGLY:

Q. Well, will you tell this jury what you think of the permanency of this injury, and what will probably be the effect of it?

A. That is what I would not like to answer. From experience we know it is a very questionable point. That boy may be yet—but I have answered that question.

Q. Well, go on and say what you were about to say.

A. That boy may lose his limb yet, sir.

By Mr. BROWNING:

Q. From this wound?
A. Yes, sir.
Q. You observe he is lame, do you?
A. Yes, sir.
Q. What was his tendency towards getting any better?

Mr. WILSON: The Doctor has answered that.
Mr. BROWNING: Well, that is all.

Cross-examination by Mr. WILSON:

Q. What you have described, Doctor, is incident to any compound fracture. There is always danger of such results as you have spoken about in cases of compound fracture.
A. Where the bone is much fractured, sir, there is always danger.
60 Mr. MATTINGLY: It is conceded, I suppose, that these were the cars of the defendant company.
Mr. WILSON: Oh, yes; there is no question about that.

Mrs. MOORE sworn on behalf of the plaintiff.

By Mr. BROWNING:

Q. Mrs. Moore, you are the mother of this little boy.
A. Yes, sir.
Q. How old is he?
A. He will be nine on the 18th of January.

By Mr. MATTINGLY:

Q. His name is Hamilton A. Moore?
A. Yes, sir.

By Mr. BROWNING:

Q. His father's name is Hamilton O. Moore?
A. Hamilton O. Moore.

Cross-examination by Mr. WILSON:

Q. Where did you live, Mrs. Moore?
A. The place where I live now?
Mr. WILSON: Where did you live at the time of this accident?
A. At 330 Missouri avenue.

By the COURT:

Q. How far from Four-and-a-half street is your residence?
A. About six or seven houses down—it was at the time.

The plaintiff here rests his case.

61 *Evidence for Defendant.*

Mr. Wilson here opens to the jury on behalf of the defendant, at the conclusion of which, upon the motion of Mr. Browning, the court directs the witnesses in the case to leave the court-room.

GEORGE W. BEALE sworn on behalf of the defendant.

Examined by Mr WILSON:

Q. Will you please state your name?

A. George W. Beale.

Q. Were you the driver of car No. 50 a year ago last April?

A. Yes, sir.

Q. Will you please tell what happened in April in regard to this little boy?

A. Well, I cannot tell how many were in the street, but I believe there were about five or six little boys playing in the street when I turned the curve.

Q. You were the driver of car 50 going down to the Arsenal?

A. Yes, sir; when I turned the curve I was in a walk, and I always met car No. 15 there, just past the house. The car was not far from me—coming—and the little boys were playing in the street.

By the COURT:

Q. I did not hear you. Begin your testimony again.

A. As I was turning the curve down there—I always walk the horse around——

Q. What car were you on?

A. No. 50.

Q. Well, go on.

A. There were five or six little boys playing in the street. The little boys were playing around by running across the street about fifty yards from me when I first saw them. This other car was coming down, and this little boy came out from behind the rear of the car—I do not know where he came from—and fell between the single-tree and the car. I did not know at first what it was.

62 I thought it was a dog, and I put down the brake, and I found him under the hind wheel. The other wheel had passed over him, and then his father came and got him out; at least I was told it was his father afterwards.

Mr. BROWNING: Never mind.

Q. (Exhibiting diagram.) Just state where the little boy came from.

A. I was here (indicating), and this car had passed me, all except the hind end, and this little boy came running from behind the car and fell right between the single-tree and the car; the front part of the car had passed him entirely. He was hanging on 15 car or coming from behind it.

Q. He fell between the horse and the front wheel of your car?

A. Yes, sir.

Q. At that time the body of car 15 had passed you?

A. Yes, sir; had passed me entirely. He was hanging on 15 car

or running into the street behind it and it knocked him down. I thought it was a dog at first.

Q. Did you see car 15 after you passed it?

A. Yes, sir; I always bowed my head and spoke to the driver.

Q. Did you do that then?

A. Yes, sir; I just nodded my head.

Q. Where was the boy then?

A. He was either hanging on 15 car or behind it: I could not tell where.

Q. Well, was that the first you saw of the boy?

A. Yes, sir. There were four or five in the street.

Q. What were they doing?

A. Playing, I think; I could not tell what: I did not pay attention.

Q. Had you seen that little boy before?

A. No, sir; not to my knowledge.

Q. Did you see him again after the accident?

A. I went, within an hour afterwards, to see his parents at the house: his father and one of the doctors—I cannot tell which one—and his father exempted me from all blame.

Mr. BROWNING: Well, never mind; you know you have no right to testify to that.

63 Q. Well, I will ask you if you went to the house of the little boy and saw his father?

A. Yes, sir.

Q. State what occurred there in the presence of the little boy and his father (the father being the plaintiff in this case) in regard to your carelessness or any statement there in regard to it.

The COURT: I understand you now to call for the statements of the father.

Mr. WILSON: Yes, sir; the plaintiff in the case in regard to the accident.

Mr. BROWNING: I wouldn't object to this if I had the father here. I have been unable to get the father here this morning, and for that reason I object to that now. That question has been decided before.

After further colloquy between the court and the counsel—

The COURT: I think I will have to hold the objection well taken.

Mr. WILSON: Well, I take an exception.

By Mr. WILSON:

Q. Do you know a man by the name of Joseph Gordon, a watchman?

A. Yes, sir. I saw him, sir, around there after the accident happened.

Q. Did he help to take the boy out?

A. He was there making some fuss.

Q. Did he help to take the boy out?

A. I cannot say whether he did or did not, sir.

Cross-examination by Mr. MATTINGLY:

Q. After this accident occurred, Mr. Beale, did the company discharge you?

A. No, sir; they did not.

Q. You have never been discharged, then, from that day to this?

A. No, sir.

Q. You are still in the employ of the company?

A. No, sir; I left of my own accord.

Q. How soon after this accident?

64 A. I cannot say exactly—about a month.

Q. Did you remain in the employ of this company about a month after this accident?

A. No, sir; I asked them to change me to another car.

Q. Onto another road?

A. No, sir; the same road, but to a different car.

Q. You were changed, then, after the accident, to another car?

A. Yes, sir.

Q. As driver?

A. Yes, sir.

Q. Was that immediately after the accident?

A. Yes, sir. After I went to work I drove that car another day.

Q. And then you were transferred to another car at your own request?

A. Yes, sir.

Q. You were transferred, I understand, one day after the accident to another car?

A. Yes, sir, to the best of my knowledge.

Q. And you continued to drive that car for upward of a month?

A. Yes, sir.

Q. What did you do then?

A. I quit then, sir. I did not care to drive any more.

Q. You resigned voluntarily?

A. I was taken off for something, and I never went back to work again.

Q. You were taken off for something and not put back again?

A. Yes, sir. I did not want to go to work again.

Q. Then you did not voluntarily resign?

A. No, sir. I could have gone back if I had wanted to see the office.

Q. Where are you now?

A. Working for Otis Brothers, New York elevator firm.

Q. How did you get work?

A. By applying for it.

Q. Did you get a recommendation from Mr. Thompson, the president of this company?

A. No, sir.

Q. Did not require any?

A. No, sir.

65 Q. Merely applied for work, and they gave it to you?

A. Yes, sir.

Q. How long after?
A. About two months.
Q. What did you do in the interim?
A. I worked for several firms—for Mr. Schneider and others.
Q. What is your trade?
A. No trade; handy around iron work; that is all.
Q. Well, at the time you were taken off and not put on again, what was that for?
A. Well, sir, I got drunk off duty, and I insulted one of the transfer agents, and I was taken off, and I never went to see about getting back. I could have gone to work, though.
Q. And you never applied for work after that?
A. No, sir; I did not.
Q. Now, you were driving slowly, I understand, around that curve?
A. Yes, sir.
Q. And you kept on driving slowly?
A. Yes, sir.
Q. How was car 15 driven?
A. Nothing unusual about him at all. He was in a trot, of course. He was on the down grade.
Q. He was on the down grade and in a trot?
A. Yes, sir.
Q. There is not much of a down grade there, is there?
A. No, sir.
Q. Very slight, isn't it?
A. Yes, sir.
Q. At about what speed was he going?
A. Well, about as you see any of the cars.
Q. Well, I have seen some of them going pretty fast.
A. He was not going fast at all.
Q. As you turned the curve I understand you to say that you ordinarily met car 15?
A. Yes, sir; I ordinarily met him on that square.
Q. That is a short square, isn't it?
A. Yes, sir.
Q. Can you give us an idea of the length of that square?
A. Well, from here to across the street; somewheres about that length.
66 Q. As you turned the curve where was car 15?
A. Midway of the square.
Q. At that time, I understand you to say, you saw these five or six boys playing in the street?
A. Yes, sir.
Q. Car 15 kept on at the same rate he was going. Was he in a trot?
A. Yes, sir.
Q. Was he in a fast trot or a slow trot?
A. No, sir; not a fast trot.
Q. He was not going at a fast rate of speed?
A. No, sir.
Q. You did not notice this little boy particularly?

A. No, sir; I did not.

Q. Did you have any passengers in your car at that time?

A. I had four, to the best of my knowledge.

Q. Do you remember whether they were gentlemen or ladies, or both?

A. I think there were two ladies and two gentlemen.

Q. Half and half. Do you remember, or do you know, how many passengers car 15 had?

A. I did not take any notice of that.

Q. I understand that at the time of this accident you were going south, and the body of car 15 had passed you. Was car 15 east or west of you? You were on the inside track.

A. I was on the west track.

Q. On the west track going down?

A. Yes, sir.

Q. And car 15 was on the east side coming up?

A. Yes, sir.

Q. As I understand, the body of car 15 had lapped over your car?

A. Yes, sir; the horse had passed my car, and the body of the car had passed my car.

Q. You cannot say whether that boy was on car 15 or ran in behind it?

A. No, sir.

Q. (Exhibiting to witness diagram showing location of cars, &c.) Was that the position?

A. Yes, sir; somewhat like that.

Q. You spoke to the driver of 15 as you passed?

A. Yes, sir; raised my hand and bowed my head.

67 Q. You were not looking into the car and talking?

A. My front door was shut, sir.

Q. Well, it might have been shut, but you could still have been looking into the car?

A. No; I was looking straight ahead, sir.

Q. You are positive about that?

A. Yes, sir.

Q. Then this boy, there, fell from car 15, or ran in behind it under your horse's feet?

A. Yes, sir; he must have struck the end of the single-tree.

Q. You thought it was a little dog?

A. Yes, sir.

Q. Did you hear anybody scream out at that time?

A. No, sir.

Q. Why did you stop?

A. I stopped, sir, as quick as I could—as soon as I saw it.

Q. If you had thought it was a little dog, would you have stopped the car?

A. Certainly, sir; I would not run over a dog if I could help it.

Q. You had run over him by that time?

A. No, sir.

Q. Did you feel the thump of the hind wheel?

A. No, sir.

Q. Did that impel you to stop the car?

A. No, sir.

Q. The front wheels had run over him by that time?

A. No, sir; I had not run over him at the time I tried to put the brakes on.

Q. Did the driver of 15 call out to you, "That is what you get for not looking?"

A. No, sir; never spoke a word; did not have a chance to speak to me; he had passed me entirely.

Q. He never said that to you?

A. No, sir.

Q. What are your duties in connection with the driving of a car? You have something to do besides driving your horse?

A. We have to make change and look for passengers, and try not to run into anybody or over anybody.

Q. You have no conductor on the car?

A. No, sir.

68 Q. You have to drive your horse; you have to look out for passengers——

Mr. WILSON: Well, that is argumentative.

Mr. MATTINGLY: I am cross-examining the witness.

Q. Well, you have to drive your horse——

Mr. WILSON: I object, your honor, to that form of interrogation.

The COURT (to the witness): Well, go on.

Mr. WILSON: I except to your honor's ruling?

By Mr. MATTINGLY:

Q. You have to look out for passengers?

A. Yes, sir.

Q. You have to stop your car if a passenger wants to get on and stop your car when the bell rings and a passenger wants to get off?

A. Yes, sir.

Q. When the bell rings from the inside of the car?

A. Yes, sir.

Q. You have to collect fare and make change?

A. Yes, sir.

Q. And with all those duties you have to look out as well as you can to keep from running over anybody in the streets, I presume?

A. Yes, sir.

Q. Do you remember whether any passenger had got on your car just before you turned the curve there on that day?

A. No, sir; I cannot say.

Q. What time of day was this?

A. I think, sir, it was between four and five o'clock.

Q. You cannot say whether any passenger had got on just before you turned the curve or not?

A. No, sir.

Q. Had any passenger got on after you turned the curve?

A. Not as I know, sir; no, sir.
Q. You do not know?
A. Not to my recollection.
Q. You cannot say as to that?
A. No, sir.
Q. Did you make a statement of what transpired to the company after this accident?
A. No, sir; no more than I told them just how I ran over the child; just how it was done.
69 Q. You told the officers of the company?
A. Yes, sir.
Q. Was it reduced to writing?
A. Yes, sir; I think so.
Q. Did you make any affidavit to it?
A. No, sir.
Q. You did not?
A. No, sir.

Mr. MATTINGLY: That is all.
Mr. BROWNING: I want to ask a question.
The COURT: Well, I can allow but one counsel.
Mr. BROWNING: Well, I will have Mr. Mattingly ask it.

By Mr. MATTINGLY:

Q. Did you say in your direct examination, when Mr. Wilson was examining you, that you were in the habit of meeting car 15 at the curve, as you turned the curve?
A. No, sir; not particularly; midway of the square, as a general thing.

Redirect examination by Mr. WILSON:

Q. Which square do you mean (exhibiting diagram)?
A. That square, between the curve and the next corner (indicating).
Q. On Four-and-a-half street?
A. Yes, sir.

JOHN J. GLEASON sworn on behalf of the defendant.

Examined by Mr. WILSON:

Q. Were you in the employ of the Metropolitan Railroad Company a year ago last April?
A. Yes, sir.
Q. What car were you on?
A. Car 15—supposed to be.
Q. Will you please state now what occurred on the day when that little boy was hurt? Please state which way you were going.
A. I left the Arsenal at six o'clock, and coming down Four-and-a-half street, within a hundred feet of Missouri avenue, I met car No. 50. As I was passing him I looked at the car passing, and I
70 saw the boys running. I saw one of them catch onto the

end of my car and catch hold of the hand-hold, and was knocked down.

Q. Please describe by this diagram (handing diagram to witness).

A. My car was coming this way (indicating). Just at the time that this car was passing me I noticed this boy jump on the tail end of this car (indicating). He just put one foot on, coming down Four-and-a-half street. He steps right on this car (indicating car 15), and just as he did that here was this other car just even with me at that moment (indicating).

Q. Then, what attracted your attention to that?

A. I knew when he stepped off he would certainly get run over.

By the COURT:

Q. The end of your car was alongside the horse of the other car?

A. Yes, sir; at that time.

Q. You say you saw the boy when he got onto your car?

A. Yes, sir; he got onto the hand-hold of the car, and he stepped right off; the other boys were running.

At this point, one o'clock p. m., a recess was taken for thirty minutes.

After recess John J. Gleason's cross-examination was continued.

By Mr. MATTINGLY:

Q. Coming up Four-and-a-half street you were on the east track, were you not?

A. Yes, sir.

Q. You were driving north?

A. I was coming north.

Q. You were on the right-hand track?

A. Coming down Four-and-a-half street; yes, sir.

Q. You were on the track on the east side of the street?

A. No; I call that the west side of the street coming down. Coming towards the north that is the right hand. I was on the east side.

Q. You were on the east track?

A. Yes, sir.

Q. This was the 6 o'clock trip from the Arsenal, I understand?

71 A. Yes; sir.

Q You left the Arsenal about 6?

A. About 6. Six minutes after six, I think, was the time I was to leave there.

Q. Where do you turn into Four-and-a-half street; do you come right up Four-and-a-half street?

A. Yes, sir.

Q. Did you see any boys playing about there?

A. I did, sir.

Q. How many?

A. I expect there was about six or seven, to my knowledge.

Q. Did you see the boy that you speak of as being on the step of your car when he got on the step?

A. I did, indeed. I saw him when he put his foot on the step and stepped right off. He only put one foot on and stepped right off. He was running away from the other boys.

Q. He stepped right on and off?

A. Yes, sir; he stepped right on and off.

Q. Instantaneously?

A. Yes, sir.

Q. And as he stepped off, what then?

A. Then the other car was alongside of me. When he stepped off the horse's head was just at the tail end of my car. The horse was right in contrast with the bottom end of my car at that time.

Q. The horse's head was at the tail end of your car?

A. Yes, sir; about that time.

Q. The length of the horse and the trace is just about the length of the car, is it not?

A. Oh, the car was longer than the horse, of course.

Q. I know; but there is some space between the rear of the horse and the front of the car?

A. Yes, sir; I expect the horse was half his length past the car when the boy stepped off.

Q. Then his head was not at the tail end of your car?

A. Well, he was just passing the car. The horse was at the latter end of the car. I don't know whether his head, or probably half of his body—some portion of it.

Q. You were coming this way (illustrating)?

A. Yes, sir.

Q. And car No. 50 was going the other way?

72 A. Yes, sir.

Q. As the boy stepped on the horse of car No. 50 was at the rear end of your car?

A. At the rear end of my car.

Q. And as the boy stepped off of your car he ran right into car No. 50?

A. Certainly he did.

Q. Whereabouts?

A. He fell right underneath the horse; as he stepped over of course he hit against the horse and was knocked—he was knocked in between; I suppose the front feet knocked him.

Q. The front feet of the horse attached to car No. 50 knocked the boy down, according to your idea?

A. After he stepped off the car he fell under the horse; he couldn't help falling, and the horse couldn't help knocking him.

Q. The front feet of the horse did knock him, in point of fact?

A. Well, he knocked himself when he stepped off and hit against the horse.

Q. Did you see where the boy was knocked to?

A. When he was knocked first he was along the track—lying on the track.

Q. And the body of the horse passed over him, and the front car wheel caught him?

A. Yes, sir.

Q. Did you see the front car wheel go over the boy?

A. I did indeed.

Q. Did the rear wheels go over him?

A. No, sir; the driver put the brake on.

Q. Did you stop your car?

A. I did, sir.

Q. Where did you stop your car?

A. I stopped about eight feet from where the boy was run over; that was the distance from the front of the car; the cars were about eight feet apart when I stopped.

Q. Then you stopped your car within the space of about eight feet?

A. Yes, sir.

Q. Did you go to the boy's assistance?

A. Yes, sir; I got out of the car.

Q. Did you help pick the boy up?

73 A. No, sir; I did not, because there were two men got hold of him before I did.

Q. You heard the testimony of this one-armed colored man, Joseph Gordon, this morning, did you not?

A. Yes, sir.

Q. Did you see him there?

A. No, sir.

Q. Do you know who it was picked the boy up?

A. The driver was one and I think some gentleman in the car, if I am not mistaken—in the driver's car.

Q. Car No. 50?

A. Yes, sir.

Q. Somebody in his car?

A. I think it was some of the passengers. I am not positive about it. I am pretty sure it was one of the gentlemen in the car.

Q. You did not see this one-armed colored man, Gordon, there at all.

A. No, sir; I did not.

Q. (Handing to witness a paper upon which was a picture of a house.) Do you remember that house on Four-and-a-half street?

A. Yes, sir; I think I have seen that house on the corner of Four-and-a-half street and Missouri avenue.

Q. Can you state in respect to that house about where the accident happened?

A. Yes, sir; as near as I can possibly guess at it, I expect it was pretty near a hundred and fifty feet.

Q. A hundred and fifty feet from that house?

A. Yes, sir.

Q. In which direction?

A. Going south from the house. It was about a hundred and fifty feet south from the corner of the house.

Q. A hundred and fifty feet south of this house?

A. From the corner house on the corner of Four-and-a-half street and Missouri avenue; that is the house I am talking about.

Q. You are not certain whether it was that house or some other house?

A. I thought you had reference to the house on the northeast corner of Four-and-a-half street and Missouri avenue.

Q. It was a hundred and fifty feet south of there?

74 A. Yes, sir.

Q. Where this accident happened?

A. Yes, sir; about that.

Q. And you are confident it was the same boy that stepped on and off your car who met with the accident?

A. It certainly was.

Q. It was not any other boy?

A. No, sir; it was him.

Q. Are you still in the employment of this company?

A. No, sir.

Q. When did you quit its employ?

A. I quit, I think, in April of that year—I mean May, rather.

Q. The following month?

A. Yes, sir.

Q. Were you discharged?

A. No, sir.

Q. Did you resign?

A. Yes, sir; I did.

Q. How long after this accident happened?

A. Well, I suppose it would be just about a month; maybe not quite a month. I know it was the month following I quit.

Q. Did you resign in consequence of this accident?

A. Yes, sir; I quit on my own accord for a better job.

Q. You did not understand the question. I asked you whether you resigned in consequence of this accident?

A. O, no, sir; no, indeed. It had nothing to do with it.

Q. You quit because you had a better job?

A. Yes, sir; I work at my trade.

Q. What is your trade?

A. Carpentering, sir.

Q. Have you been carpentering ever since then?

A. Ever since then; yes, sir.

Q. Where are you employed now?

A. I am employed on H street, between Tenth and Eleventh. I ought to go to work there to-day. I have been working on K street, between Ninth and Tenth, for the last six or eight weeks.

Q. Doing journeyman carpentering work?

A. Certainly.

Q. Have you applied for a position to be replaced on this road?

75 A. No, sir.

Q. Do you know when the driver of car No. 50 was discharged?

A. Well, sir, he was put off that very moment he came back.

Q. He was discharged at the end of that trip?
A. He was not discharged; he was put off.
Q. When he got to the end of his trip?
A. When he came back; yes, sir.
Q. Was he put on again?
A. Yes, sir.
Q. How long afterward?
A. I suppose it was not more than two weeks then.
Q. He was put on about two weeks afterward?
A. Yes, sir; I don't think there was that much time; I am not positive about the time; I know he was put on afterward.
Q. Was he put on before you left?
A. Yes, sir.
Q. In driving there, what hour did you go on duty?
A. I have been accustomed to going on at eight o'clock at the latter end of the time I was there.
Q. At the latter end of your employment by this railway company?
A. Yes, sir; I went on at eight o'clock.
Q. At this time, in April, 1881, when the accident happened, when did you go on duty?
A. Well, about that time I had no regular run; sometimes I would have to be up there at five o'clock, and probably I wouldn't have anything to do, but I would have to wait for my turn, being, as I was, an extra driver.
Q. Were you a sort of supernumerary—an extra hand?
A. Well, I was what they call an extra driver—on the extra list.
Q. You were only employed as occasion might require your services?
A. Yes, sir; at that time, when I first went to driving, I had to run my chances to get something to do as well as the rest.
Q. How long had you been in the employment of the company this time?
A. Well, when I first went at railroad driving it was in December.
76 Q. The December previous to this?
A. Before this; yes, sir.
Q. That would be December, 1880?
A. Yes, sir; I think I was there about three or four days, and I never went back again any more from December until February. Then I came back some time in February and went to work and drove, off and on, until about May.
Q. During this time you would sometimes go on duty at 5 o'clock in the morning and sometimes at eight?
A. I would have to be up there, and if a driver should miss I would take his car.
Q. When you would go on duty—for instance, at 5 o'clock in the morning—how long would you remain on duty?
A. If I went on the first car, leaving there about 5.20, I would have to be there to report on time, and then I would be due on my last trip up at the stable at five minutes after five, I think, in the evening.

Q. Then you would be on duty from 5.20 in the morning until a little after 5 o'clock in the evening?

A. Yes, sir; that is, the first car.

Q. When would you go on again?

A. Well, I might have a car for a week, and when the driver came back he would take his own car.

Q. Supposing the driver would not come, and you were on regular duty?

A. Then I would still keep it.

Q. Going on at 5 o'clock in the morning and getting off at 5 o'clock in the evening?

A. I would leave the stable about twenty minutes past five on the first car leaving there.

Q. And you would be through your day's work at five minutes after five that afternoon?

A. I was due at the stable that time in the evening.

Q. Then were your duties for the day over?

A. I was relieved then until the next morning.

Q. Did you take your meals on the car or get your breakfast in the morning before 5 o'clock?

A. I would take my breakfast before I got to the stable.

By Mr. WILSON:

Q. Are little boys in the habit of playing around there in the street and getting on the cars?

A. I don't know whether the same little boy was or not;
77 but there were very often a good many of them running around there.

By Mr. MATTINGLY:

Q. It is the nature of boys to jump on behind cars, is it not?

A. They very often do that.

Miss ANNIE L. PUMPHREY sworn and examined.

By Mr. WILSON:

Q. Please state if you were on a car going down Four-and-a-half street, in April, 1881, when an accident happened and a little boy was run over.

A. Yes, sir; I was in car No. 50, which was going towards the Arsenal. Shortly after we had turned the curve from Missouri avenue onto Four-and-a-half street the car jolted suddenly, and at that time I heard a scream. It was all at the same minute. Instantly the driver put on the brake and sprang over the front of the car, and I afterwards heard some one say that a child had been run over.

Q. Never mind about that. How long from the time you felt the jolt was it before the car stopped?

A. It seemed to be instantly—almost right at the moment.

Q. How fast was the car moving?

A. I do not know. I was conversing at the time and was not paying any attention.

Q. Who else was in the car with you?

A. I do not remember any of the persons; I don't remember anything else at all connected with it.

By the COURT:

Q. You say you were conversing with some one.

A. Yes, sir.

By Mr. WILSON:

Q. Do you remember with whom you were conversing?

A. Yes, sir; it was my mother.

Q. You don't know who else was in the car?

A. I don't remember any one else.

By Mr. MATTINGLY:

Q. I understand you that you felt the jolt of the car and heard the boy scream?

A. No, sir; I did not say I heard the boy scream; I heard some one scream.

Q. And at the same time the driver of the car put on his brake?

78 A. Yes, sir; I looked instantly to the driver, and he put it right down.

Q. He sprang to the brake and turned it?

A. He sprang over the front of the car.

Mrs. ADDIE GLEASON sworn and examined.

By Mr. WILSON:

Q. Are you the wife of Mr. Gleason, who was examined here a few moments ago?

A. I am, sir.

Q. Will you please state if you were on the car coming up Four-and-a-half street at the time the accident happened to the little Moore boy?

A. Yes, sir; I was.

Q. Which car were you on?

A. I was on the one coming from the Arsenal.

Q. And being driven by your husband?

A. Yes, sir.

Q. Where were you in the car?

A. I was sitting right up in the corner towards the horse; there was not but two others in the car.

Q. Do you remember who they were?

A. No, sir; I do not; I did not take any notice.

Q. Will you please state what you saw of the accident?

A. I saw three or four little boys run in front of the horse of the car I was in first and run across the street, and then they ran around and ran back, and the little boy stepped his foot up on the step and

stepped off against the other horse, and the horse knocked him on the track and the front wheel went over him.

Q. This being the car going down and this being the car going up (illustrating with two books); you were on the car going up?

A. Yes, sir.

Q. You were sitting at the end of the car?

A. Yes, sir.

Q. And you saw the little boys running in front?

A. Running in front of the car first; they were playing from one side of the street to the other; they ran across in front of the horse first, and then they ran around on the other side of the pavement and came back again, and he stepped one foot up on the platform on that side.

79 Q. The back platform?

A. Yes, sir; the step outside. Then he stepped off right against the horse, and the horse knocked him down on the other car.

Q. The horse that was on the car going down?

A. Going down; yes, sir.

Q. Did you get out?

A. No, sir; I did not.

Q. Did you see the little boy?

A. I seen some man have him after he picked him up.

Q. Was that the little boy that was here this morning?

A. I could not tell; I don't knew whether it was or not.

Q. How was the car that you were in going?

A. It was not going very fast; it was going as cars ordinarily go.

Q. About the usual speed?

A. Yes, sir.

Cross-examination by Mr. MATTINGLY:

Q. You were in car number 50, were you?

A. I don't know the number of the car.

Q. It was the car your husband was driving, coming up from the Arsenal?

A. Yes, sir.

Q. Your husband knew you were in there, I suppose—did he not?

A. Oh, yes.

Q. There is no question about that.

A. No.

Q. Do you remember which side of the car you were sitting on?

A. I was sitting on the right hand of the car coming up.

Q. Which side of the car were these boys on when you first saw them?

A. On the right-hand side—no; on the left-hand side.

Q. Then they ran from the left-hand side of the street in front of the horse attached to the car in which you were?

A. Yes, sir.

Q. Across to the other side of the street?

A. Yes, sir.

Q. To the right-hand side?
80 A. Yes, sir.
Q. Did they run back again?
A. They ran around and then ran back again, and he stepped upon the platform on the outside of the car.
Q. They ran around in front of the horse in the first place?
A. Yes, sir.
Q. Then they came back, and as they were coming back one boy got on the step of the car?
A. Yes, sir; he stepped one foot on the car and stepped off again and stepped right against the horse.
Q. Did he step right on and then right off?
A. Yes, sir.
Q. Where was the other car at that time?
A. Well, it was right alongside of the other one.
Q. The cars were right alongside of each other?
A. Yes, sir.
Q. Was it the fore or the hind feet of the horse that the boy was knocked against?
A. I could not tell that.
Q. Did you hear him scream?
A. No, sir; I did not.
Q. You did not hear anybody scream?
A. No, sir.
Q. Did your husband stop his car?
A. Yes, sir; he did.
Q. How far did he go before he stopped?
A. Well, he just got past and stopped.
Q. You and your husband talked this matter over at the time, I suppose, did you not?
A. Well, we talked it over; yes, sir.
Q. Did you make a statement at the time of what you knew about the transaction?
A. I did.
Q. Immediately after the accident occurred?
A. I did, sir.
Q. You did not witness the accident itself, did you?
A. No, sir.
Q. Do you know whether the boy that was on the step was the boy that was hurt?
A. Yes, sir; I think it was.
Q. You think it was?
A. I'm pretty sure.
81 Q. Is that opinion simply based on the natural supposition that the boy that was on the step was the boy that stepped off and got hurt?
A. Yes, sir.
Q. You did not see it?
A. No; I seen the boy step on the step and then off, and he stepped right against the horse, and the horse knocked him down.
Q. That was the last you saw of it?

A. The horse knocked him down.

Q. Did you see the horse knock him down?

A. I saw him step against the horse, and, of course, the horse couldn't help but knock him down.

Q. Could you see the boy jump off from where you were sitting?

A. The door was open, and that is how I saw the boy step on the step.

Q. And from your position on the opposite side of the car you could see him step against the horse and fall?

A. I did not see him when he fell.

Q. And you did not see him after that?

A. Yes, sir; I seen him after that.

Q. Did you get out of the car afterwards?

A. No, sir, I did not, but I could see out of the window.

Q. Did you see them when they took the boy from under the wheels of the car?

A. Yes, sir.

Q. Did you see this one-armed colored man there—Joseph Gordon?

A. No, sir; I did not.

Q. Who was it that pulled the boy out from under the car?

A. It was a tall man; I wouldn't know him if I was to see him.

Q. Was there more than one?

A. I do not remember at all.

Q. You do remember that you did not see the colored man?

A. No, sir; I did not see him.

Q. Did your husband help pick the boy up?

A. No, sir; he stayed on the car.

Q. Do you know the driver of the other car, Mr. Beall?

82 A. No, sir.

Q. Did he help to pick the boy up?

The WITNESS: The conductor?

Mr. MATTINGLY: The driver. There are no conductors on these cars.

A. I don't know whether he did or not; I don't remember.

Q. How many other passengers were there in your car?

A. Two gentlemen in there.

Q. Those were all?

A. Yes, sir.

Redirect examination by Mr. WILSON:

Q. What time of day was it that the accident happened?

A. I don't know; I couldn't tell you.

Q. Was it morning or afternoon?

A. I never paid any attention to it, for I never thought I would have to be a witness in it.

Q. You know whether it was morning or afternoon?

A. O, it was afternoon. It was in the evening, I know.

Q. Did you live down in that part of the town?

A. No, sir; I live on North Capitol street, between O and P.

Q. The car that you were on went on past the other?

A. Yes, sir.

Q. Where did you see the boy first after the accident happened; where was he lying; did you see him on the ground?

A. When I seen him he was under the car on the ground.

Q. How was he lying?

A. On his face.

Q. Which way was his head directed—toward you or the other way?

A. The other way.

Q. Was he between the wheels when you first saw him?

A. Yes, sir.

Q. Who picked him up, as near as you can recollect; who was there beside the driver?

A. I don't remember.

Q. Any persons that you have seen here, that you remember?

83 A. I do not remember.

Q. Do you remember who carried him off?

A. No, sir; I do not.

Q. When you saw him lying on the ground in that position, crosswise, with his feet under the car and his head this way (illustrating), how far had you got?

A. I was, I suppose, about as far as from here to that table (indicating table at which Mr. Wilson was sitting).

Q. A short distance?

A. Yes, sir.

EDWARD F. O'BRIEN sworn and examined.

By Mr. WILSON:

Q. What is your occupation?

A. Examiner in the Pension Office.

Q. Where do you reside?

A. 1017 Four-and-a-half street southwest.

Q. How long have you resided there?

A. Six years.

Q. Were you on the car on Four-and-a-half street in April, 1881, when an accident happened to a little boy named Moore?

A. I was.

Q. Please state what you saw.

A. I was sitting in the car on the west side, in the corner——

Q. (Interposing.) Which car?

A. No. 50.

Q. Going which way?

A. Going home, towards the Arsenal. On turning the curve, and just beyond the curve, on Four-and-a-half street, I was suddenly thrown forward from my seat by the sudden stopping of the car, and, jumping up, got out of the car and found a child lying between the front and hind wheels. The clothing of the child was held by the hind wheels, and from the statements that were made——

Mr. MATTINGLY: (Interposing.) Just state what you saw.

The WITNESS: I saw the child there lying under the car.

Q. Did you assist in taking the child out?

A. No; there were two or three others who got there. A gentleman who was in the car with me, a Mr. Miller, got off before I did.

84 Q. He and the driver?

A. The driver jumped right over the dash-board as soon as ever he stopped the car.

Q. How soon after you felt this motion was it that the car stopped?

A. Instantly. Instantly it was done; I don't know how soon. It seemed to me a herculean effort to stop the car, although we were going slow.

Q. Before the accident happened had you seen any boys in the street?

A. It had been a source of annoyance to all the old passengers of the cars of the children jumping on the cars and riding. I have myself complained about it. The children would jump on the cars and throw the doors open and scream in the cars; and once in awhile, when a car door would be open, they would throw in some kind of missile; jump on the car, and throw it in and jump off.

By Mr. MATTINGLY:

Q. Are you speaking now of the children in this particular neighborhood or somewhere else?

A. Right here; from the middle of Missouri avenue down to Maine avenue.

By Mr. WILSON:

Q. Had you seen this little boy before?

A. I don't remember him.

Q. Do you know a one-armed colored man there by the name of Gordon?

A. Yes, sir; but I don't think he was there until after the car was stopped and the accident had taken place. I think he came from a brick house. I think he came running out when the others came there. There was half a dozen people gathered there together, but I don't think he was there at the time of the accident.

Cross-examination by Mr. MATTINGLY:

Q. You did not help pull the boy from under the car?

A. No; there were others got out, and, being a little lame, I did not move as quickly as they.

Q. Who else was in this car that you were in besides Mr. Miller?

A. Two ladies. Mrs. Pumphrey and Miss Pumphrey and myself and a colored man, whom I think the child was given to. I think the driver—if my recollection serves me, but it is a long time
85 since—assisted in pulling the child out, and I either gave it to a colored man or to the father; I can't say which; but I have distinct recollection of a colored man being there.

Q. Was it this colored man you saw coming over?

A. No, sir; it was a man with both hands. I think the man was

a passenger on the car. Mr. Miller was sitting on the east corner of the car, and had the window open, and was chewing tobacco and spitting out. Mrs. Pumphrey and her daughter were sitting opposite, and I was sitting on the same side in the west corner of the car, and I think the colored man was directly opposite me.

Q. Were you acquainted with Mrs. Pumphrey and her daughter prior to the accident?

A. Yes, sir; I have known them, being neighbors. I have seen them on the cars every morning. I have ridden on this same car for the past five years nearly every morning, giving me time to get it, and back again at night.

Q. The first you knew of this accident was that you felt a jolt?

A. I felt a sudden stopping, and then heard a child's cry. I can't describe it. It was a kind of exclamation.

Q. From the child?

A. I think not. I think it was from some of the other children that were playing round about. I did not see the child fall. My impression then——

Q. (Interposing.) I do not want your impression, but only your positive knowledge. Simultaneously with the jolt the driver put on his brake?

A. Yes, sir.

Q. And jumped over the dash-board of the car?

A. Yes, sir; jumped right back at once.

Q. And went to the assistance of the child?

A. Yes, sir.

Q. Do you remember seeing Gordon there at all?

A. I think that he was there afterwards. I am not certain about that, but I think he was there.

Q. How long did you remain there?

A. Until the car went along. It might have been ten minutes.

Q. Do you think the car remained there ten minutes?

A. From the excitement, I presume about that. I am not certain as to the time.

Q. It remained there until the child was removed?

86 A. Until the child was removed.

Q. Have you any children of your own?

A. Four of my own and one adopted.

Q. Then you would naturally feel some interest in the welfare of children. Did you see Gordon before or after the child was removed from under the car?

A. I really can't answer that. I haven't a very distinct recollection of seeing him. It is very indistinct, indeed. There was quite a collection of people got around there; they came from all parts. It seemed as if they sprang from the ground, almost.

WILLIAM AUGUSTUS MILLER sworn and examined.

By Mr. WILSON:

Q. Where do you reside?

A. I reside at No. 1230 Four-and-a-half street now.

Q. Where did you live in April, 1881?

A. 1005 Four-and-a-half street southwest.

Q. Were you on a car going up or down Four-and-a-half street, in 1881, when an accident happened to Mr. Moore's little boy?

A. I was, sir.

Q. Which car?

A. Car No. 50, going down.

Q. Please state to the jury what you saw of that accident.

A. Well, sir, I was on car No. 50, going down towards the Arsenal. There was a car coming up from towards the Arsenal, and there seemed to be a little boy, as I presume, riding on the hind part of the car coming up.

Mr. MATTINGLY: We don't want your presumptions.

The WITNESS: I saw it; I was an eye-witness. He was riding on the hind part of the car, and he attempted to jump off the car in order to jump on the car going down, and he fell under the horse's feet, and the front wheel of the car passed over him. The hind wheel did not pass over him. I assisted in pulling the little boy out from under the car. A colored man took the little boy and started to cross the vacant lot with him, and some gentleman took him. I don't know who he was. I don't know who the child was, and I don't know who the gentleman was who took the child. That is about all I know of it.

87 Q. Do you know the colored man, Joseph Gordon?

A. I do not. I have seen him frequently. He used to be a watchman, and probably is now.

Q. Did he assist in taking the child out?

A. He was there at the car at the time, and he probably did give some assistance, but what I do not know. I was a little excited at the time. I know I helped pull the child out. I remember this man being there.

Q. When you saw the boy after he had fallen how did he lie?

A. He lay with his head out towards the track, and the car passed over his hips, it appeared to me.

By the COURT: Did you observe what the driver was doing at the time the accident occurred?

A. I was not noticing the driver at all, sir, at the time; but I remember he took the car up very suddenly—more suddenly than I could have taken it up. I know I could not have taken it up so soon. The driver had but a moment's notice from the time the child stepped from the other car before he fell.

Q. How was the door?

A. The door was closed between me and the driver, but it was a pleasant evening, and I was sitting with my head out of the window.

Cross-examination by Mr. MATTINGLY:

Q. Were you sitting in the front of the car?

A. No, sir; at the rear of the car.

Q. Was the rear door of the car open?

A. I think it was—yes, sir; it was open in the car I was going down on.

Q. You were on car No. 50?

A. Yes, sir; going down.

Q. And you were sitting in the rear of that car?

A. Yes, sir. The cars were just about passing each other.

Q. From where you were sitting you saw this boy riding on the rear of the car?

A. I didn't see him riding; I saw the child when he fell.

Q. When I told you I didn't want your supposition you said you saw him riding?

A. I saw the child fall.

88 Q. Did you see the boy on the platform of car No. 15?

A. I did not, sir; I saw him when he fell; I didn't see him on the platform.

Q. Did you see him when he struck the horse, or when the horse struck him?

A. I saw him tumble, and he appeared as if he fell right from the platform of the car, and right under the horse's feet.

Q. That is what it looked like to you?

A. Yes, sir.

Q. But you did not see him on the platform?

A. I did not see him on the platform; I saw the fall of the child, but did not see him on the platform.

Q. Can you tell us what the relative position of these two cars was at the time you saw the boy fall?

A. I don't know that I can precisely, sir.

Q. Were they alongside of each other, do you know?

A. Not precisely, sir; I don't think they were; I feel satisfied they were not exactly alongside of each other; they were pretty near passing each other.

Q. Was the horse of car No. 50 lapping car 15?

A. Just about passing car No. 15—the car going up; the horse was just about passing the car; as near as I can remember now I should say so, but it was long ago, and I have lost sight of it for some time; it has been now nearly two years, and I haven't thought but very little of the case.

Q. Do you remember when this accident occurred?

A. It occurred in the latter part of April, sir.

Q. How do you remember the month?

A. Because I remember very well, sir; I was out collecting ice bills; that is the way I remember; I remember what I was doing now that it is called to my memory.

Q. Collecting ice bills was something you did frequently, was it not?

A. That was my business; the latter part of the month and the first of the month it is my business to collect the bills; I drive my own wagon and collect my own bills.

Q. Not only in April, but in any other month?

A. Yes, sir.

Q. Then how does the fact that you collected bills fix the time in your mind as April?

A. Because I remember my business very well.

89 Q. You do remember it from this fact?

A. Yes, sir; I remember it from that fact.

Q. And you remember from that fact that it was in the month of April?

A. It was in the month of April.

Q. Did you make any statement to any of the officers of the company about that time?

A. I think, probably, Mr. O'Neill was down there that night to see how the accident occurred, and I told him to the best of my knowledge.

Q. Who was he?

A. He was the gentleman who worked for the company; that is all I know about it; they told me it was Mr. O'Neill.

Q. That was the night of the accident?

A. The night after the accident occurred.

Q. And you made a statement to him at that time?

A. Yes, sir.

Q. Did you know the driver of this car?

A. I did not.

Q. Did you know the driver of car No. 15?

A. I did not know the driver of either one.

Q. You say he stopped the car very quickly—in less time than you could have done it?

A. Certainly.

Q. Have you had any experience in stopping street cars?

A. No, sir; I never had; I said it was less time than I could have done it if I had been placed in his position.

Q. Do you remember who was in the car with you at the time?

A. I do not.

Q. Do you remember how many there were?

A. I do not.

JOHN J. GLEASON recalled.

By Mr. WILSON:

Q. Will you please state whether at the time this accident happened, or about that time, you hallooed to the driver of the car, "That's what you get for not looking," or anything of that kind.

A. No, sir; I did not.

Q. No expression like that?

90 A. No, sir; I did not say anything of the kind. All I told him was, when I stopped the car and got off, when the parties in the car made the remark that he was not to blame, I told him that he had better get letters to certify that it was not his fault.

Q. That was all that was said?

A. Yes, sir.

By Mr. MATTINGLY:

Q. Then you did not say to him as you passed by, "That is what you get for not looking?"

A. I never made any such remark.

Q. It is a pretty serious matter to a driver of one of these cars when an accident occurs, is it not?

A. Not serious to the driver; not as I think it is.

Q. It is a matter very diligently inquired into and the driver discharged?

A. Well, in case of an accident he is not discharged, but he has got to get letters to show that it was not his cause.

Q. That is the first thing he has to do—get a statement showing he is not in fault?

A. Yes, sir; of course.

Q. And that is the advice that you gave this other driver?

A. I made that remark; yes, sir; that is what I told him when the parties made the remark—that he he had better get his passengers to say that he was not in fault here.

Q. Did he do that?

A. I don't know whether he did or not; I suppose he did, sir.

Counsel for the plaintiff withdrawing objection previously made—

GEORGE BEALL was recalled and examined as follows:

By Mr. WILSON:

Q. Will you please state now to the court and jury what was said by Mr. Moore after the accident happened?

A. Well, sir, about an hour after the accident happened I got off my car and went to see the parents of the child, of course, the same as anybody else would do. When I went in and saw the little child and the position he was laying in it brought tears to my eyes. The father came up to me and put his hand, I believe, on my
91 shoulder and told me not to bother myself, that I was not to blame at all; that they didn't lay any blame to me at all, and so did the doctors in the house.

Q. What did he say about the little boy?

A. He said that he was the recklessest one of the two, and that he didn't expect anything else than to see him run over some day or other.

Q. There were two little boys, were there?

A. Yes, sir.

By Mr. MATTINGLY:

Q. How often did you see Mr. Moore after the accident?

A. I saw him once or twice, I believe.

Q. Which was it, once or twice?

A. Twice, sir.

Q. The first time was about an hour after the accident?

A. It was, sir.

Q. When was the second time?

A. It was a Sunday evening, and I called to see how the child was.

Q. Do you remember what day it was that the accident happened upon?

A. I do not. I couldn't tell you to save my life.

Q. Was it the first Sunday after the accident that you visited him?

A. I would not say that. I know it was on a Sunday evening, though.

Q. And it was on the occasion of your second visit that he said he was the "recklessest" boy of the two?

A. Yes, sir.

Q. And that he was not surprised at it, or something of that sort?

A. Yes, sir.

Q. On this first visit, when you went there, what was your object in going?

A. My object in going was to see the child, of course.

Q. You did not go there to get a statement from the child's parents exonerating you?

A. No, sir; not altogether in that effect. I went to see the little child because I felt sorry for running over it.

Q. Have you told us all that transpired on that occasion?

A. Yes, sir; I have.

92 Q. Did you not beg Mr. Moore to give you a statement at that time, telling him you would be ruined if he did not?

A. No, sir; I did not beg any such thing.

Q. You did not implore him to do it?

A. No, sir.

Q. Did you ask him for a statement?

A. No, sir.

Q. You did not.

A. No, sir; I told him that I did not care about driving over the road any more where I ran over the little child. I told him that, and that is all I told him.

Q. But you did not ask him for any statement to furnish the company to exonerate you?

A. No, sir.

Q. You did not beg him for such a statement?

A. No, sir; I did not.

Q. You did not tell him that unless you got a statement of that sort you would be discharged, and it would be your ruin?

A. No, I did not.

Q. And you would be thrown out of employment and have nothing to do?

A. No, sir.

Q. You did not tell him anything of that sort?

A. No, sir.

Q. Had you been drinking anything that day?

A. No, sir; I only drink off duty.

Q. Whenever you drink you get off?

A. Yes, sir.

Q. After this accident happened, and before you reached the house, had you been drinking?

A. No, sir.

Q. You were not under the influence of liquor on that occasion?

A. No, sir; I was tempted to take a drink, and was told not to do it by my wife.

Q. After the accident happened?

A. Yes, sir; after I went home I didn't touch a drop.

Mr. MATTINGLY: If you always obey your wife you will get along well.

The WITNESS: I did on that occasion, at any rate. I went there sober.

93 Q. You are very positive you did not beg Mr. Moore to give you a statement exonerating you?

A. No, sir.

Q. Did Mr. Moore tell you he had seen anything of this accident?

A. No, sir; he did not.

Q. Did he say to you how he could say whether you were to blame or not?

A. He said I was not to blame; that is all. He exonerated me from all blame. That is what he told me.

Q. That is what he told you on that occasion?

A. Yes, sir.

Q. The second time you saw him did he not tell you he had inquired into the matter, and found out you were to blame?

A. No, sir; he did not.

By the COURT:

Q. You were on car number 50, were you not?

A. Yes, sir.

By Mr. WILSON:

Q. You did not get any statement in writing from Mr. Moore?

A. Not as I know of.

At this point, 2.55 p. m., the court adjourned until to-morrow morning at 10 o'clock.

94 *Rebutting Testimony for the Plaintiff.*

WASHINGTON, D. C., *December 7th*, 1882.

The court met pursuant to adjournment.

Present: Respective counsel.

HAMILTON O. MOORE sworn and examined.

By Mr. MATTINGLY:

Q. You are the father of the little boy that was injured?

A. Yes, sir.

Q. State to the jury whether or not you witnessed the accident.

A. I did not see it, sir.

Q. Were you at home at the time?

A. Yes, sir.

Q. On Missouri avenue?

A. Yes, sir.

Q. State whether George W. Beall, the driver of car number 50, called at your house after the accident; and, if so, at what time he was there.

A. He came there that evening—I think it was about 9 o'clock.

Q. Mr. Beall says that he called about an hour after the accident happened to see how the little boy was, and saw him, and that his condition brought tears to his eyes, and that you put your hand upon his shoulder.

A. No, sir; I did not.

Q. And told him not to worry himself; that he was not in fault. Is that so?

A. It is not so. How could I tell him he was not in fault when I did not see it?

Q. You did not tell him so?

A. No, sir; I did not.

Q. He says he saw you on that occasion, and on a subsequent occasion on Sunday. He does not say whether it was the Sunday immediately following the accident or not; but he called on you on a Sunday, and you told him that you were not surprised that this little boy had met with an accident, because he was the "recklessest of the two boys."

A. I never told him any such thing.

Q. You did not tell him that?

A. No, sir.

Q. In point of fact, is he the more reckless of the two boys?

A. No, sir.

Mr. WILSON: I object.

Mr. MATTINGLY: Why?

Mr. WILSON: You may ask what he said about it; I have no objection to your asking what he said.

Q. How often was Beall at your house?

A. He was there a number of times.

Q. About how often?

A. I couldn't exactly tell you. I know he was there a number of times.

Q. More than twice?

95 A. O, yes, sir.

Q. Half a dozen times?

A. Yes, sir; it was more than half a dozen times.

Q. Has anybody ever cautioned you about allowing your boys to run the streets?

A. No, sir.

Q. Was it to you or to your wife that Mr. Beall stated he had a wife and two children, and would be thrown out of employment?

A. I know that he said he was thrown out of employment; I don't recollect about making the statement.

Cross-examination by Mr. WILSON:

Q. You bring this suit for your son?

A. Yes, sir.

Q. The boy's name is Hamilton A. Moore?

A. Yes, sir.

Q. The declaration in this case is signed by Benjamin F. Butler and Frank T. Browning. Did you employ Gen. Butler?

A. I employed Mr. Browning.

Q. You never employed Gen. Butler?

A. I left that for Mr. Browning to do.

Q. This accident happened in April?

A. Yes, sir; 1881.

Q. And this suit was brought in September?

A. I think about September; along about then.

Q. Do you know the president of this company?

A. I never saw the man.

Q. Did you ever go to see him?

A. No, sir.

Q. Did you ever go to the president of the company and make any complaint about this accident?

A. No, sir; I never went near the company.

Q. Did you ever write any letter to the company?

A. No, sir.

Q. Have you any objection to stating, in case this twenty thousand dollars is recovered, how much is for the benefit of the boy and how much for counsel, and whether the fee is contingent?

(Objected to. Objection sustained and exception by defendant.)

96 Q. What time of the day was it when this accident happened?

A. I think it was along in the evening about 7 o'clock; between six and seven, I think.

Q. Where were you?

A. I was at the house.

Q. How far is that from where the accident happened?

A. Well, I should think it was two hundred feet; I couldn't exactly state.

Q. Did you say that after the accident happened you made no application to the company?

A. No, sir; I never did.

Q. For any payment or settlement, or any complaint?

A. No, sir.

Q. You say that you did not say to Beale that he was not liable?

A. I did not.

Q. That he was not at fault?

A. I did not say anything. He came there——

Q. Well, just answer the question. Did you say shortly afterwards to anybody that the company was not liable?

A. No, sir; I did not say a word to anybody.

Q. Or that the driver was not in fault?

A. No, sir.

Q. You haven't any recollection of saying that?

A. No, sir.

Mr. WILSON: That is all.

Redirect examination by Mr. MATTINGLY:

Q. Do you know whether Mr. Browning, as your attorney, wrote to Mr. John W. Thompson, the president of this company?

A. Yes, sir; he notified Mr. Thompson or the railroad company.

Q. He notified Mr. Thompson, the president of the railroad company?

A. Yes, sir.

Recross-examination by Mr. WILSON:

Q. Well, one other question that suggests. How long after this accident happened did you employ Mr. Browning?

A. I think right away.

97 Q. When was that letter written?

A. I cannot tell you when the letter was written; I do not know when he wrote the letter.

Q. You do not know when the letter was written?

A. No, sir.

Mr. BROWNING (to Mr. Wilson): About a week afterwards; you have got the letter.

Mr. WILSON: Yes; I am going to show it to you.

Q. This letter from Mr. Browning is dated August 23, 1881; that was four months after the accident happened?

A. I do not know when he wrote it; I was not in the office.

Q. And you do not know when you employed him?

A. Well, I know it was soon after the accident; I cannot tell the dates.

Mr. WILSON: Well, that is all.

HAMILTON A. MOORE sworn on his own behalf.

By Mr. MATTINGLY:

Q. Say whether, on the day this accident happened to you, you jumped upon the car.

Mr. WILSON: I object to that, may it please the court.

Mr. MATTINGLY: Let me finish my question.

Mr. WILSON (to witness): Don't answer, please, until the court tells you to answer.

Mr. MATTINGLY: The question I propose to ask is, whether on the day this accident happened to him he jumped upon the rear steps of either of these cars.

Mr. WILSON: There are two objections to that. In the first place, it is leading, or rather, in the first place, it is attempting on rebuttal to go into a question that should have been offered in proof in chief. We offer our testimony, and in rebuttal they attempt to make out a case they should have made out originally; it is certainly leading.

Mr. MATTINGLY: There was, certainly, nothing in our evidence-in-chief going to show any likelihood of this boy having jumped upon the cars. The defense is that he did jump upon the rear step of this car, No. 15; that is their defense, and I am simply rebutting that.

The COURT: Well, it seems to me that if you were going to examine the boy you should have produced him before.

Mr. MATTINGLY: Your honor can see the age of the boy and the difficulty in examining him. I do not wish to examine him about the accident, but simply upon this one point in rebuttal, and that is that he was not on the steps of this car. We could not anticipate that they were going to put this boy upon the step of that car.

Mr. WILSON: No; but you did show how the accident happened, and proved affirmatively that he was not on the step of the car. The colored man testified that he was running across the track and ran against the car. This is an entirely different theory.

The COURT: Well, it is very difficult getting along with this child as a witness, anyway; it involves the necessity of putting direct leading questions to him, also. I am very reluctant about having him sworn at this time.

Mr. MATTINGLY: Well, I will withdraw him.

The COURT: Well, you can frame the question, if you can, so as to get an answer to it.

Mr. WILSON: He seems to be rather young to be a witness, your honor, and there should be some further explanation as to whether he understands the nature of an oath, although he may be intelligent.

Mr. MATTINGLY: Well, I will withdraw him, if your honor please, and put another witness on the stand.

98 —— MAURY sworn on behalf of the plaintiff.

By Mr. MATTINGLY:

Q. State where you reside, Mr. Maury.

A. I live at 312 C street, sir.,

Q. State whether in April, 1881, at the time of the accident to little Ardie Moore, you were in the neighborhood and saw the accident; and, if so, state where you were.

A. I was on Missouri avenue, going on down towards the depot. I had just crossed Four-and-a-half street and gotten on the opposite corner and saw a whole lot of little boys out in the street playing, and there was a car coming around the curve.

Mr. WILSON (to Mr. Mattingly): What do you undertake to prove by him?

Mr. MATTINGLY: That this boy did not jump upon the step of the car.

The COURT: Well, direct his attention to that.

Mr. WILSON: I enter an objection to that as being properly evidence-in-chief and not in rebuttal. I note an exception to your honor's ruling.

The COURT (to Mr. Mattingly): You cannot call a witness and go over the transaction.

Mr. MATTINGLY: I do not desire to do that. I am only sorry we did not have Mr. Maury before.

Q. You say you saw the accident, Mr. Maury?

A. Yes, sir.

Q. It has been testified here, Mr. Maury, that this little boy, in running across the street, jumped upon the rear step of the car coming up and immediately jumped off again and was struck by the horse of the other car. Just state to the jury whether or not in point of fact he did jump upon the step of the car and immediately off again—whether he was on the step or not.

Mr. WILSON: I object to that as involving the whole controversy and opening up the issue on the one side and the other.

The COURT: Well, let him answer.

Mr. WILSON: I reserve an exception.

By Mr. MATTINGLY:

Q. All the court will permit you to answer is, whether this boy jumped upon the step or not.

A. No, sir; he did not.

Q. You saw him?

A. Yes, sir; I saw him running across the track and saw him fall and the car run over him.

Mr. WILSON: Your honor will see now how that places us.

The COURT: Yes, it is irregular.

Cross-examination by Mr. WILSON:

Q. I want you to explain to the jury, please, in reference to Missouri avenue, where you were, and how you happened to see the little boy.

A. I was walking down Missouri avenue——

Q. Well, wait a moment. (Mr. Wilson here draws a diagram and exhibits the same to the witness.) There is the track on Four-and-a-half street, just this way, north and south (indicating); there is the car coming one way, and here is the car going the other way—car 50 going that way and car 15 going this way. Here are the sidewalks, here (indicating). Where were you?

99

A. On the corner of Missouri avenue and Four-and-a-half street.

Q. Down here (indicating)?

A. Yes, sir. This car (indicating) had gotten along there (indicating) and ran over the little boy.

Q. Where had he been?

A. He was running across the street, a little below the colored man's house named Joe.

Q. He was running across here (indicating)?

A. Yes, sir.

Q. And he was knocked by the horse?

A. I do not know whether he was knocked by the horse or not.

Q. Did you see him fall?

A. Yes, sir.

Q. Where did he fall; under the wheels?

A. I think the last wheel passed over him.

Q. Where did he fall?

A. Here (indicating on diagram).

Q. When he fell which way did he lie—with his face out this way (indicating)?

A. I did not notice that.

Q. But it was on this side of the track, between that car, No. 50, and this sidewalk (indicating)?

A. Yes, sir.

Redirect examination by Mr. MATTINGLY:

Q. Did you see this colored man Joe there?

A. Yes, sir.

Mr. MATTINGLY: That is all, your honor.

100 *Proceedings in General Term.*

HAMILTON A. MOORE, by Next Friend, *vs.* THE METROPOLITAN RAILROAD COMPANY. } At Law. No. 23109.

MAY 15, 1883.

Argued by Messrs. Browning and Mattingly for the plaintiff, and for the defendant by Mr. Nathaniel Wilson, and submitted to the court.

101 *Appeal Dismissed. Motion for New Trial Overruled. Judgment Affirmed, with Costs, June 1, 1883.*

HAMILTON A. MOORE, by Next Friend, *vs.* THE METROPOLITAN RAILROAD COMPANY. } At Law. 23109.

Now again come here as well the plaintiff as the defendant, by their respective attorneys; whereupon, it appearing to the court that the order of the court below overruling the motion for a new trial on a case stated, upon the ground that the verdict of the jury was against the weight of evidence, is not an order from which an appeal lies to this court, and it also appearing to the court that the plaintiff's exceptions to the admissability of evidence and to the rulings and instructions of the court were not well taken, the said appeal is hereby dismissed, and the motion for a new trial on exceptions is now overruled, and the judgment of the court is affirmed, with costs.

102 *Opinion of the Court.*

This was an action by the plaintiff, an infant of tender years, by his father, as next friend, to recover damages for an injury suffered by being thrown down and run over by a car of the Metropolitan railroad line. At the trial, after the testimony for the plaintiff was closed, counsel for the defence asked the court to instruct the jury to render a verdict for the defendant on the ground that the evidence did not make out a *prima facie* case of negligence on the part of the defendant company. The instruction was refused, and that is the

subject of the first exception. In the course of the trial several other exceptions were taken—one or two to the admission or exclusion of evidence, one to the rejection of a prayer for instructions by defendant, one to the granting of a prayer by the plaintiff for instructions, and finally one to the charge; but the only one on which stress was laid in the argument was the first, and that brought before the court simply the question whether the evidence introduced into the case was sufficient to make out a *prima facie* case to go to the jury, and whether the court ought not to have told the jury that there was not sufficient evidence upon which to find a verdict for the plaintiff. It should be remarked here that, even if the evidence for the plaintiff is of itself insufficient to made out a *prima facie* case, yet if any defect in it is supplied by the evidence offered afterwards by the defendant, the plaintiff is entitled to the benefit of that, and the error of the court, if there was error, in refusing an instruction such as was asked in this case, would thus be redressed by the defendant's own act. Therefore the question can be considered fairly only in the light of all the evidence introduced into the case, and it must appear that the whole of the evidence offered by both sides did not present sufficient facts to make a *prima facie* case to go to the jury before the decision of the court can be reversed for the refusal to give the instruction prayed. Now, in this case, the evidence on the part of the plaintiff was, in substance, that on the occasion in question a car, numbered 50, belonging to this defendant, had just turned from Missouri avenue into Four-and-a-half street to go down towards the Arsenal, and about half-way down that square met coming up car number 15; that the plaintiff, a child of about 7 years of age, undertook to cross the track, and did cross, before car No. 50, but, through some accident, struck against the horse of car No. 15, which was coming up, and by that contact or collision with those horses was thrown between the horse drawing car No. 50 and the front axle of the car; that that wheel passed over his legs, and that the driver arrested the car barely in time to prevent the hind wheels also from going over him. The testimony tended clearly to show that car No. 15, which was running north, was going at a very rapid speed in order to make up lost time and that car No. 50 was going slowly, but that the driver was not looking ahead, but was conversing with some one in the car, and consequently that his face was turned around toward the car. It further appears that as soon as the boy fell and the car ran over him the driver of car No. 15 exclaimed to the other one: "That's what you get by not looking out."

Perhaps the only facts material to the case contributed by the evidence for the defense (of which facts the plaintiff is entitled to avail himself) are that this place had been a sort of a playground for boys; that they had been in the habit of jumping on and off the cars, and that on this occasion the two drivers both saw the boys playing in the street. One of the drivers says he saw the boys, but did not know whether they were playing or not.

Now, it is argued on the part of the plaintiff that the driver of car No. 50 was negligent in not keeping a proper lookout. Further, a

witness for the plaintiff testifies that he gave the alarm as soon as he saw the boy fall, and attracted the attention of the driver to the boy, so that the driver at once checked the car and prevented the hind wheels from running over him, from which it is argued that if the driver had been keeping a proper lookout he would have seen the boy in time to prevent even the fore wheel from running over him. It is claimed also that the driver of car No. 15, coming up, was negligent in travelling at an unusual speed at a point where he would meet another car, and where there was more than ordinary danger because of the presence of these boys playing, he having full knowledge that they were in the habit of playing there, and that children were present there on this particular occasion. The question is whether these facts constitute sufficient evidence of
103 negligence on the part of the defendant to go to the jury.

Two cases somewhat analogous to this one have been cited. One of them is that of Railroad Company *v.* Gladmon, 14 Wall., 401, in which I was counsel myself. A car was running along Bridge street while some boys were playing there, and one of them suddenly undertook to cross, and was thrown down and had his kneepan torn off by the wheel. One witness, Mr. Hill, testified that the driver was not looking forward, but was conversing with some one alongside of him, and that if he had been keeping a proper lookout he would have checked the car in time. It did not seem to have occurred to the court in that case, any more than in this, that there was not sufficient evidence to make out a *prima facie* case. The case went to the jury, and they rendered a verdict for $9,000. I forget whether it was attempted to have the verdict set aside on the ground of insufficient evidence. At all events it was not done.

Another case cited was that of R. R. Co. *v.* Stout, 17 Wallace, 657. In that case it appeared that the railroad company which was sued (the Sioux City & Pacific Railroad Co.) owned a turn-table which was situated on its own premises entirely, but was unenclosed and adjacent to two public roads. A little child wandered away from its home, three-quarters of a mile distant, strayed into this place, got to playing on the turn-table, and had his foot crushed. The company was sued and certain instructions were asked, but the question really presented was whether there was sufficient evidence from which the jury could infer negligence on the part of the defendant. It appeared from the evidence that children had been in the habit of playing there, and had been several times warned off by the railroad employees. The court said that the mere fact that children had played there before was sufficient to give notice to the company that there was danger of their coming there again, and the fact that an injury did actually happen there was sufficient evidence to go to the jury, that the condition of the turn-table was dangerous; that these facts constituted notice to the company that the place was dangerous, and that there was a possibility of children being injured there, and that this, with the fact that the child in question was injured, was enough to make a case to go to the jury. The court say: "That the turn-table was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly

be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the road-bed and the turning rail of the table they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turn-table on other occasions, within the observation and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case."

It may be said in this case, by parity of reasoning, that the fact that children had been in the habit of playing at this identical spot was a warning to the agents of this defendant that children might on other occasions be found playing there, as they were on the occasion in question, and that the fact that an injury did happen from the meeting of two cars at that point was sufficient evidence that every occasion of the meeting of cars at this point where children were in the habit of playing was an occasion of danger. In the case of the Railroad Co. *v.* Stout the court say: "The evidence is not strong, and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors." We think we must entertain the same view in reference to this case. Though the evidence of negligence may be slight, and though it might have affected us differently from the way in which it affected the jury, we cannot feel at liberty to say that there was not sufficient evidence to go to the jury. If this had been the case of an adult we should have little difficulty in holding that there was sufficient contributory negligence on his part to defeat a recovery, but we cannot say so in regard to a minor child of tender years. There is hardly any set of circumstances which a court can say, as matter of law, amount to contributory negligence on the part of such a plaintiff as that. It is always finally a question of fact whether the capacity of the child is such that he can be charged with contributory negligence, and as a question of fact it must necessarily be submitted to the jury for determination.

104 There was no argument addressed to the court upon the other exceptions, and it is hardly necessary that I should discuss them at any length, but I will briefly notice one or two of them. There were three prayers asked on the part of the plaintiff, none of which seem to us to be objectionable. The counsel for the defense, apparently as a matter of precaution, excepted generally to the granting of those prayers. The exception itself is not exactly regular, because it does not except specially to the granting of each prayer. However, I do not think it is necessary to notice those further.

The defendant asked four instructions, one of which was refused. The one refused was as follows:

"If the jury find from the testimony that, at the time of the accident described in the declaration, the plaintiff was a child seven years of age, and was allowed by his father, who sues as the next friend of said child, to play in the street in which the defendant's tracks are situated, and the said child ran in the way of car No. 50 in a manner which amounted to negligence, and in consequence thereof received the injury complained of, and that the driver, as soon as he perceived said child, endeavored to stop said car, but was unable to do so in time, and was not negligent in the management of said car, the plaintiff is not entitled to recover."

That embodies two propositions. The first is that if the parent of the child was negligent, that negligence is to be charged to the plaintiff, and that that, with other facts, is to be considered by the jury as a defense. Now, we do not understand the law to be so. If a parent sues for the loss of services contributory negligence on the part of the parent is a complete defense; but if the child sues by the parent or any other next friend it is no defence.

The next proposition is decidedly faulty. It puts the question of the child's negligence to the jury and states that the child's negligence is to be estimated without reference to his capacity. The Supreme Court held in the Gladmon case that the jury must be instructed that the negligence imputable to a child must be estimated with reference to his tender years; that "the caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case." This part of the instruction, omitting that qualification, is therefore faulty, under the ruling of the Supreme Court.

There was a charge by the court which occupies some four pages of the record, and the counsel for the defence except generally to it in every part. This is faulty in form, because, while there is a portion of the charge that was objected to, there are other portions wholly unobjectionable, and a general exception which does not segregate the objectionable part is faulty in form. But we may say that even the part complained of is correct.

On these grounds the motion for a new trial on the exceptions will have to be overruled.

105 In the Supreme Court of the District of Columbia.

HAMILTON A. MOORE, by His Next Friend, Hamilton O. Moore, *vs.* THE METROPOLITAN RAILROAD COMPANY.	At Law. No. 23169. In Error.

Filed July 3, 1883.

R. J. MEIGS, *Clerk.*

Know all men by these presents that we, The Metropolitan Railroad Company, principal, and A. H. Herr, surety, are bound unto

the above-named Hamilton A. Moore in the sum of eight thousand dollars, to be paid to the said Hamilton A. Moore, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 28th day of June, 1883.

Whereas the above-named Metropolitan Railroad Company has prosecuted its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Metropolitan Railroad Company shall prosecute its said writ to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Sig'd) THE METROPOLITAN R. R. CO.,
By J. W. THOMPSON, *Pres't.* [SEAL.]
(S'g'd) A. H. HERR. [SEAL.]

Sealed and delivered in presence of—
(S'g'd) E. L. WHITE.

Approved.
(S'g'd) W. S. COX.

106 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said court before you between Hamilton A. Moore, by his next friend, Hamilton O. Moore, plaintiff, and the Metropolitan Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

United States, this 2nd day of July, in the year of our Lord 1883, and of the Independence of the United States the 106th.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS,
Clerk of Supreme Court of the District of Columbia.

W. F. MATTINGLY,
F. T. BROWNING,
Att'ys.

Service ack'd.
July 3, '83.

W. F. MATTINGLY,
Att'y for Pl'ff.

DISTRICT OF COLUMBIA, *To wit:*

To Hamilton A. Moore, by his next friend, Hamilton O. Moore:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Metropolitan railroad is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

R. J. MEIGS, *Clerk.*

107 [Endorsed:] Moore *vs.* Met. R. R. Citation. Filed July 3, 1884. R. J. Meigs, clerk. By J. R. Young, ass't clerk.

Endorsed on cover: Dist. of Columbia supreme court. No. 247. The Metropolitan Railroad Company, plaintiff in error, *vs.* Hamilton A. Moore, by his next friend, Hamilton O. Moore. Filed 5th May, 1884.

Supreme Court of the United States.

OCTOBER TERM, 1886.

THE METROPOLITAN RAILROAD COMPANY,
PLAINTIFF IN ERROR,
v.
HAMILTON A. MOORE, by his next friend, HAMILTON O. MOORE,
DEFENDANT IN ERROR.
No. 247.

In Error to the Supreme Court of the District of Columbia.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This was an action brought by Hamilton A. Moore, an infant of tender years, by his next friend, Hamilton O. Moore, to recover $20,000 damages for injuries caused by the negligence of the defendant's servants in the management of the defendant's cars numbered 15 and 50, and the horses attached thereto, running on Four-and-a-Half street near Missouri avenue, in the city of Washington, whereby the plaintiff was knocked down and run over by car number 50, and severely and permanently injured.

At the trial of the case, and after the testimony for the plaintiff was closed, the defendant asked the court to instruct the jury that, upon the testimony offered in behalf of the plaintiff, the plaintiff was not entitled to recover.

This was refused, and an exception was taken, which was duly preserved by a bill of exceptions.

Record, p. 18.

On the trial several exceptions were taken by the plaintiff in error to the rulings of the court upon questions relating to the evidence and to instructions gived by the court to the jury, which are not relied on here, and which it is not necessary therefore to refer to.

The jury rendered a verdict in favor of the plaintiff for $5,000, and judgment was entered thereon.

Record, p. 4.

The defendant thereupon moved for a new trial on exceptions taken at the trial, and also on the following grounds:

1. Because the verdict was against the weight of evidence.

2. Because the verdict was against the instructions of the court.

3. Because the damages awarded by the jury were excessive.

Record, p. 25.

The motion for a new trial, on the ground that the verdict was against the weight of evidence and against the instructions of the court, and was for excessive damages, was heard by the justice before whom the case was tried, and was overruled; and from the order overruling and denying the motion an appeal was taken to the court in general term. The order and appeal are as follows:

"The motion for a new trial coming on to be heard upon the pleadings, the testimony, and the rulings of the court, as set forth in said pleadings and in the stenographic report, filed herewith and marked Exhibit A, which said report contains all the testimony in the case and the rulings of the court, the same is hereby overruled; and from the order of the court overruling said motion the defendant hereby appeals to the court in general term.

"By the court:

"MACARTHUR, *Justice.*"

Record, p. 25.

The court in general term dismissed the appeal, and entered the following judgment:

"Now again come here as well the plaintiff as the defendant, by their respective attorneys, whereupon, it appearing to the court that the order of the court below overruling the motion for a new trial on a case stated, upon the ground that the verdict of the jury was against the weight of evidence, is not an order from which an appeal lies to this court, and, it also appearing to the court that the plaintiff's exceptions to the admissibility of evidence and to the rulings and instructions of the court were not well taken, the said appeal is hereby dismissed, and the motion for a new trial on exceptions is now overruled, and the judgment of the court is affirmed, with costs."

Record, p. 69.

The defendant below then sued out the present writ of error.

Record, p. 74.

ASSIGNMENTS OF ERROR.

I. The court below erred in dismissing the appeal taken from the order made at the special term disallowing the defendant's motion for a new trial on the ground that the verdict was against the weight of evidence.

II. The court below erred in overruling the motion for a new trial on the defendant's exception to the refusal of the trial justice to instruct the jury that upon the whole evidence offered in behalf of the plaintiff the plaintiff was not entitled to recover.

ARGUMENT.

I.

The first assignment of error raises the question of the jurisdiction of the Supreme Court of the District of Columbia, sitting in general term to review on appeal a decision made at a special term denying a motion for a new trial on the ground that the verdict was against the weight of evidence.

It is contended on behalf of the plaintiff in error that where the trial justice holding the special term has entertained on his minutes and overruled a motion for a new trial made on the ground that the verdict was against the weight of evidence, and where all the evidence in the case is presented on appeal to the court in general term, it is the right of the suitor and the duty of the court, under obligatory provisions of law, to review the evidence and to determine for itself whether or not the verdict was in fact against the weight of evidence.

The sections of the Revised Statutes of the United States relating to the District of Columbia, in which the right and duty here contended for have their origin, are as follows :

"Sec. 753. The several general terms and special terms of the circuit courts, district courts, and criminal courts authorized by law, are declared to be, severally, terms of the Supreme Court of the District of Columbia ; and the judgments, decrees, sentences, orders, proceedings, and

acts of the general terms, special terms, circuit courts, district courts, and criminal courts rendered, made, or had, are and shall be deemed judgments, decrees, sentences, orders, proceedings, and acts of the Supreme Court; but nothing contained in this section shall affect the right of appeal as provided by law.

* * * * * * *

"Sec. 772. Any party aggrieved by any order, judgment, or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the Supreme Court, and upon such appeal the general term shall review such order, judgment, or decree, and affirm, reverse, or modify the same, as shall be just.

* * * * * * *

"Sec. 803. If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed.

"Sec. 804. The justice who tries the case may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial was had.

"Sec. 805. When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case stated shall be settled in the usual manner.

"Sec. 806. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict, or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a general term."

In this case the court below gave no reasons for the

dismissal of the defendant's appeal further than to say that an appeal would not lie from the order appealed from. No explanation of, or reference to, their views thereon is contained in their opinion, printed on page 67 of the record.

This was because, a few weeks before, in the case of *Stewart* v. *Elliott* (2 Mackey, Rep., p. 307), decided March 13, 1883, the court had given a carefully considered opinion concerning the very point in controversy.

It there decided that the Revised Statutes of the District of Columbia give the right of appeal on motions for a new trial only in three cases: 1st. Where the motion has been urged on exceptions; 2d. *For insufficient evidence*; 3d. For excessive damages.

It also decided that the term "insufficient evidence," in section 804, is to be construed as meaning evidence *legally* insufficient, and that a verdict against the weight of evidence cannot be said to be a verdict upon insufficient evidence.

It, therefore, held, that a motion for a new trial, because against the weight of evidence, is left, by the statute, as a matter resting in the discretion of the trial justice trying the case, and is not appealable.

It is submitted that the restrictive construction given by the court below to section 804, Revised Statutes, is unwarranted.

a. The words therein used have a plain and well understood legal signification.

Sufficient evidence is that *amount of proof* that ordinarily satisfies an unprejudiced mind.

Insufficient evidence is that *amount of proof* that does not satisfy the mind and conscience of an unprejudiced man, and so convince him that he would venture to act in that connection in matters of the highest concern.

1 Greenleaf Ev., Red. Ed., p. 4.

A verdict on proofs that were insufficient in this sense, always subject to be reviewed and set aside by the judge trying the cause, but the usual form of objection to the verdict was, not that it was on insufficient evidence, but that it was contrary to the evidence or against the weight of evidence.

In the statute under consideration a term was adopted sufficiently general to include for both of these grounds for a new trial.

b. This appears to have been the opinion of the court below during a period of twenty years, and until the decision in the case of *Stewart* v. *Elliott*, already referred to.

In the case of *Converse* v. *R.R. Co.* (2 MacArthur, 507), the court said :

"The questions whether a verdict was contrary to the evidence, or, secondly, whether the damages were excessive, are not questions that can be considered on a bill of exceptions. To enable us to do that a case should have been made bringing before us all the evidence taken on the trial to enable this court to judge whether, under all the circumstances of the case, the verdict was against the weight of evidence, or whether, secondly, the damages were excessive."

In the case of *Dant* v. *D. C.* (3 MacA., 270), on an appeal from a decision on a motion for a new trial on the ground that a verdict was contrary to law and the evidence in the case, the court held that the motion properly presented the question "as to whether the evidence was insufficient to support the verdict," and reviewed all the testimony in the case.

In the case of *Sinclair* v. *W. & G. R.R. Co.* (MacArthur and Mackey, p. 13), it was decided that the court has the right, in the exercise of its discretion, to refuse a new trial when the verdict is based upon any "considerable amount of testimony."

c. Sections 804, 805, 806, of the Revised Statutes, D. C., are derived from and are almost identical with parts of sec. 264 of the New York Code of Procedure as amended April, 1852, which section contains the following provision:

"The judge who tries the cause may in his discretion entertain a motion to be made on his minutes to set aside a verdict, and grant a new trial upon exceptions or for insufficient evidence, or for excessive damages; but such motion in actions hereafter tried if heard upon the minutes can only be heard at the same term or circuit at which the trial is had. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form upon which the argument of the appeal must be had."

In the case of Allgro *v.* Duncan (24 Howard's Pr. R., 210), the Supreme Court of New York construe the meaning of what the court termed the "awkward phrase," "insufficient evidence."

It was then contended that a verdict against all the evidence, and founded upon no evidence, is not a verdict upon insufficient evidence.

The court, Emott, justice, said:

"The argument is ingenious but not sound. Perhaps if we were in the unhappy condition of the rising generation of lawyers, knowing nothing of practice but the code, we might be embarrassed with the decision of this and similar questions. But the safe rule in such cases is to apply the former practice and interpret the obscurities and deficiencies of the code by its light.

"I shall therefore assume that a motion to set aside a verdict, and for a new trial, upon 'insufficient evidence,' means a motion for a new trial on the ground that the verdict is against the evidence."

On appeal, the court of appeals affirmed this judgment, and Woodroff, J., said:

"Nor, in my judgment, is the right of the judge to entertain such a motion upon his minutes rendered less clear by calling this a verdict against evidence; true, it is a verdict in the face of clear and uncontradicted proof, establishing the issue in the defendant's favor, but is, nevertheless, a verdict without evidence to support it. The term 'insufficient evidence,' as used in the code, should be construed with reference to the actual issue upon which the jury were to pass *and not less with reference to the whole state of the case made by the adverse party.*"

Allgro *v.* Duncan, 39 N. Y., 316.

In the case of McDonald *v.* Walker (40 N. Y., 551), the same court held that the section of the N. Y. Code, referred to in the case just cited, conferred power enough to warrant a motion to set aside a verdict upon the minutes of the judge when the evidence in the cause would not sustain the verdict.

The court said:

"In such a case, and in a just sense, the evidence upon which the verdict proceeds, and by which alone it is upheld or can be claimed to be supported, is insufficient."

In the case of Sharkey *v.* Torrihillon (7 Hun., 344), the Supreme Court in general term in 1876 held that a verdict against the weight of evidence, although not within the express terms used in section 264 of the code, declaring that the judge may entertain the motion upon exception, or for insufficient evidence or excessive damages, yet is clearly within its intention and spirit.

The new code of New York, 1876–1877, section 999, amended section 264 of the code of 1852, and substituted for the words "insufficient evidence," "contrary to the evidence."

The Supreme Court held that the statute gives the power to the trial justice to exercise his discretion to en-

tertain a motion to set aside a verdict because against the weight of evidence.

If in the exercise of his discretion the trial justice does entertain such a motion on his minutes, the right of appeal from his decision does not appear to have ever been doubted.

d. For the same reasons it is contended that the statute in force in this District gives to the trial judge the right in his discretion to entertain on his minutes a motion for a new trial on the ground that the verdict is against the weight of evidence. If he exercises that discretion and entertains such a motion on his minutes, there is a right of appeal from his decision.

e. This in accordance with the general scope and purpose of the law, which does not make the Supreme Court of the District a separate and independent court, but makes both general and special terms terms of the same court.

f. It is in accordance with the intention of Congress, as expressed in sec. 772, which provides that an appeal may be taken from any order passed at a special term if the same "involve the merits of the action."

In the case of Mackey *vs.* Lewis (54 How. Pr. R., 504) it was held that an order refusing a new trial made after judgment was an order involving the merits of the action.

II.

This court will not, of course, examine the testimony in the record to determine whether or not the verdict was against the weight of evidence.

If the court below had jurisdiction of the defendant's appeal, then the defendant has the right to have the judgment of that court on the question of the weight of the evidence.

The judgment of the court below thereon would be final, and not reviewable here.

III.

The trial justice should have instructed the jury that the plaintiff's evidence constituted no proof of any negligence on the part of the defendant.

The testimony on behalf of the plaintiff gave no rational or intelligible explanation of the accident to the plaintiff, and did not tend to show negligence on the part of the defendant.

The only eye-witness to the occurrence examined in chief testified that the plaintiff in broad daylight run from the west side of 44½ street in front of car 50, which was moving slowly south, while car 15 was rapidly approaching from the opposite direction, and, after clearing the track on which car No. 50 was running, struck his foot and hit the horse drawing car No. 15, and that the horse of car No. 15 knocked the little boy under car No. 50.

R., pp. 26 and 27.

The witnesses for the defence, the drivers of the two cars, and a passenger in car 15, and a passenger in car 50, testified that just before the accident the plaintiff was *behind* car 15 riding on the step of that car, or hanging on to the handle by the step, and stepped suddenly off and fell between the single-tree and the front of car 50, the driver of which instantly put down the brakes of the car, but too late to prevent the front wheels from going over the defendant.

Rec., pp. 38, 44, 51, 57.

NATHANIEL WILSON,
Attorney for Plaintiff in Error.

21-558

In the Supreme Court of the UNITED STATES.

October Term, 1886. 11c 247

THE METROPOLITAN RAIL ROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

HAMILTON A. MOORE by his next friend, HAMILTON O. MOORE.

—o—

BRIEF FOR DEFENDANT IN ERROR.

—o—

FRANK T. BROWNING,
WILLIAM F. MATTINGLY,
Attorneys for Defendant in Error.

In the Supreme Court of the UNITED STATES

October Term, 1886.

THE METROPOLITAN RAIL ROAD COMPANY,
Plaintiff in Error,
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HAMILTON A. MOORE, by his next friend,
HAMILTON O. MOORE.
No. 247.

BRIEF FOR DEFENDANT IN ERROR.

Exceptions.

No 1. Demurrer to the evidence introduced on behalf of the defendant in error.

This evidence showed that Hamilton Moore, a little boy of seven years of age, was playing together with some other little boys in the street at the intersection of Missouri Avenue and Four-and-a-half street, and whilst so playing attempted to cross the tracks of the plaintiff in error; that whilst crossing, he was struck by the horse of one of the cars of the said company, to wit, car number 15, which was going north, and knocked over on the other track and was run over by another of the said company's cars, to wit, car number 50, which was going south This evidence further showed that that the little boy had cleared the first track and gotten over to the track on which car number 15 was coming up, which last mentioned car was going at a great rate of speed, or, as one of the witnesses says

as though it was making up for lost time, (Record p. 7,) and that the driver of car number 50 was not on the look-out, but was talking to some one in the car at the time the boy was run over, and that the driver of car number 15 said to the driver of car number 50 as he passed, "that is what you get for not looking." (Record p 7.) This evidence further showed, that this locality was a sort of play grounds for children. It also showed, that the driver of car number 50 stopped the car between the time of the cryout and the time that the hind wheels of the car reached the boy. This evidence we contend was sufficient to base the verdict on, for it showed negligence on the part of the driver of car number 50, in not keeping a lookout, and on the part of the driver of car number 15, in driving so fast when it was about to pass another car, and at a place where little boys were playing, each of which added to cause the accident. That the driver of car number 50 was not looking ahead, is demonstrated from the fact that no attempt was made to stop the car, by him, until some one screamed out and the car jolted as the front wheels passed over the boy, and then, for the first time, the brakes were put on and the car stopped before the hind wheels passed over him. Now, if there was sufficient time to stop the car between the time that the front wheels passed over him and the hind wheels reached him, surely there was time enough for him to stop the car, had he been on the lookout, between the time that the horse of car number 15 struck him and the front wheels of car number 50 reached him. This evidence, we submit, was sufficient to present to the jury the question whether or not the plaintiff in error was guilty of negligence, and whether or not the defendant in error, considering his age, was guilty of contributory negligence.

Rail-Road Company vs. Stout, 17 Wall, 657.

Rail-Road Company vs. Gladmon, 15 Wall, 401.

Exception No. 2. This exception was to the refusal of the Court, to allow testimony as to the fees of the Plaintiff's Attorneys.

We deem it unnecessary to discuss this question as it is wholly immaterial to the facts in the case.

Exception No. 3. Was as to the admissibility of the testimony of the witness Maury, in rebuttal.

The plaintiff in error having introduced evidence tending to show that the accident happened by the boy's jumping on and off the hind step of the car, Maury's evidence was offered to show that he did not jump on or off the car step, and it was in strict rebuttal of the testimony of the plaintiff in error, and was properly admitted.

Exception No. 4 This exception was to the granting of the prayers of the defendant in error. A simple perusal of these prayers will show that they stated the law correctly and in accordance with the rules of law as laid down by this Court in the cases before cited.

Exception No. 5. This exception was to the refusal of the Court to grant the plaintiff-in-error's fourth prayer.

This prayer was doubly faulty. In the first place it makes the child responsible for the negligence of its parents; and secondly, it leaves to the jury to determine as to the negligence of the child without reference to his tender years and capacity.

The law as to this last proposition is well stated in the Gladmon case before referred to; and under the rulings in that case, the prayer was rightfully rejected.

Exception No. 6. This exception is to the charge of the Court.

The charge is excepted to generally. This exception is bad in form, in not separating that which was considered objectionable from that which was unobjectionable, and was therefore properly overruled.

Another alleged error relied on by the plaintiff in error

is that the court below, in general term, held that the order of the Circuit Court overruling its motion for a new trial, "because the verdict was against the weight of evidence," is not an order from which an appeal lies to this court.

Sections 804 and 805 of the Rev. St. D. C., provide that the justice who tries the cause may, in his discretion, entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial upon *exceptions*, or for *insufficient evidence*, or for *excessive damages*, and that when such motion is heard, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

An appeal to the general term is not provided for when the motion for a new trial is based upon any other than these grounds. All other grounds for a motion for a new trial are necessarily addressed to the discretion of the court and are not appealable.

The Defendant below, abandoned its motion on the ground of excessive damages and none of the other grounds for a new trial, specified in the motion, came within the provision of law granting an appeal.

It is forced now to claim that the *insufficient evidence* in the wording of the law, is the same as against the weight of evidence.

We submit that there is a marked difference between the two. The one looks to the legal sufficiency of the the evidence to justify the verdict, the other assumes that there was evidence sufficient in law to warrant the verdict, but that the preponderance of the evidence was against the verdict. In the former case the verdict is properly ~~receivable by~~ reviewable by an appellate court, in the latter not. This court in 12 Pet., 345, Hepburn vs. Dubois, held that after a verdict in favor of either party on the evidence, he has the right to demand of a court of error that they look to the evi-

dence only to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party.

The court below in Stewart vs. Elliott, 2 Mackey 311, reviews the history of the provisions of our statute and holds in express terms (p. 315,) that the phrase "for *insufficient evidence*," cannot be construed as authorizing the general term to consider whether a verdict below was "contrary to the evidence," or "against the weight of evidence."

In the case at bar it appears that the evidence was sufficient, by the overruling of the demurrer to the evidence, which was sustained by the general term. The evidence is brief and a simple perusal of it would show that the defendant below was in no way injured by the court holding that it had no jurisdiction of the appeal, on the ground that the verdict was against the weight of the evidence.

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